

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

ON

MINES AND MINING

REPORTED FROM MAY
TO SEPTEMBER, 1918

BY

J. W. THOMPSON

ENGINEERING

ENGIN STORAGE



WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

三十一

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS
ON
MINES AND MINING

REPORTED FROM MAY
TO SEPTEMBER, 1918

BY

J. W. THOMPSON



WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

DEPARTMENT OF THE INTERIOR

BUREAU OF MINES

ABSTRACTS OF CURRENT DECISIONS

MINES AND MINING

REPORTED FROM MAY
TO SEPTEMBER, 1906

J. W. THOMPSON



GENERAL SUBJECTS TREATED.

	Page.
Minerals and mineral lands.....	3
Mining terms.....	20
Mining corporations.....	22
Mining partnerships.....	33
Principal and agent.....	36
Land Department.....	39
Public lands.....	40
Mining claims.....	41
Statutes relating to mining operations.....	59
Mines and mining operations.....	78
Mining leases.....	105
Mining properties.....	128
Quarry operations.....	135
Damages for injuries to miners.....	137
Interstate commerce.....	138

GENERAL SUBJECTS TREATED.

Page

1	Minerals and mineral lands
2	Mineral laws
3	Mineral corporations
4	Mineral partnerships
5	Patents and agents
6	Land department
7	Water lands
8	Mineral claims
9	Minerals relating to mining operations
10	Mineral and mining operations
11	Mineral leases
12	Mineral properties
13	Mineral operations
14	Mineral for minerals to minerals
15	Mineral contracts

CONTENTS.

	Page.
Minerals and mineral lands.....	3
Minerals.....	3
Nature as personal property.....	3
Nature as land—Conveyance.....	3
Conveyance of minerals—Severance.....	3
Conveyance—Effect as consummated sale.....	3
Sale of ore—Specific performance of contract.....	4
Breach of contract for sale of ore—Preliminary injunction.....	4
Agreement to purchase ore—Injunctive relief.....	5
Conversion of ore.....	6
Conversion of ore by carrier—Notice of ownership.....	6
Conversion—Recovery by owner.....	6
Conversion of ore—Measure of damages.....	6
Trespass and conversion—Jurisdiction and venue.....	7
Military seizure.....	7
Extraction of mineral from ore—Judicial notice.....	7
Process of treating ores—Judicial notice.....	8
Mineral lands.....	8
Mineral character of public land—Selection by railroad com- pany—Knowledge of agent.....	8
Sale and conveyance.....	8
Conveyance of minerals in place.....	8
Lien for purchase money—Place of enforcement.....	9
Fraud—Presumption from relationship of parties.....	9
Surface and minerals—Ownership and severance.....	10
Method of severance.....	10
Sale or reservation of minerals—Nature of estate.....	10
Conveyance of surface and reservation of minerals.....	10
Exception or reservation.....	10
Possession of surface.....	10
Adverse possession of minerals—Statute of limitations.....	11
Adverse possession of coal—Effect on ownership of oil and gas.....	11
Coal and coal lands.....	11
Coal location—Cancellation of patent—Bona fide purchaser.....	11
Fraud—Cancellation of patent—Date of receiver's receipt.....	11
Sale and conveyance—Fraudulent representations—Rescission of contract.....	11
Sale—Secret commission to officer of purchasing corporation— Fraud and rescission.....	12
Contract for sale of coal—Consideration—Compromise of doubt- ful rights.....	12

Minerals and mineral lands—Continued.	Page.
Oil and oil lands.....	13
Oil and gas as minerals.....	13
Nature and characteristics of oil—Reducing to possession.....	13
Lands valuable for oil—Proof of value.....	13
Grant of right to prospect for oil and gas.....	13
Grant of oil and gas—Rights granted.....	14
Ownership of surface—Presumption as to ownership of oil.....	14
Sale—Severance of surface and minerals.....	14
Conveyance of oil and gas—Construction of deed—Right to prospect.....	14
Conveyance—Inconsistent clauses—Construction—Intention of grantor.....	15
Injunction and receiver.....	15
Contract for drilling—Construction and consideration—"Proposed well".....	15
Tenants in common—Fraud of one tenant—Liability to others.....	16
Insurance—Loss of oil—Option to replace.....	16
Insurance—Loss of oil—Deduction for sediment.....	17
Loss of oil by fire—Measure of damages.....	17
Natural gas.....	17
Bond for franchise for natural-gas line—Damages or penalty.....	17
Receiver—Regulation of rates.....	18
Pipe lines.....	18
Improper construction on highway—Liability—Proof.....	18
Liability of owner during receivership.....	18
Railroad grants.....	19
Lieu lands—Mineral character.....	19
Selection of nonmineral lands—Knowledge of agent.....	19
Mining terms.....	20
Accident.....	20
All coal.....	20
Giant.....	20
Oil territory.....	20
Personal injury.....	20
Slow drag.....	20
Sludge.....	21
Trip.....	21
Mining corporations.....	22
Promoters—Fiduciary relation to corporation and stockholders.....	22
Promoters and directors—Accounting for secret profits.....	22
Fraud of promoters—Liability—Parties.....	22
Liability of defrauding promoters.....	23
Capital stock—Payment in property.....	23
Property received in payment of capital stock—Proof of value.....	23
Oil lease as basis of capital—Proof of value of stock.....	24
Property as basis of capital—Liability of stockholders.....	24
Sale of treasury stock—Option to purchase—Specific performance.....	24
Increase of capital stock—Right of stockholders to purchase.....	25
Right to sell unissued stock.....	25
Purchase of stock—Specific performance—Rights of purchaser.....	25
Specific performance of contract for sale of stock.....	26
Agreement to employ officer—Sale of stock—Specific performance.....	26
Principal place of business—Meaning.....	26

Mining corporations—Continued.	Page.
Duty to publish corporate name.....	27
Liability of stockholders for corporate debts.....	27
Failure to publish corporate name—Doing business.....	28
Discretion of directors—Control of courts.....	28
Director interested—Right to vote.....	28
Contract—Interest of director—Ratification by stockholders.....	28
Stockholders interested—Restriction on right to vote.....	28
Stockholder interested—Right to vote.....	29
Contract between stockholders—Effect on corporation.....	29
Action against—Service on officer—Sufficiency of return.....	29
Power to execute indemnity contract.....	29
Corporation selling products of mine—Restraint of trade.....	29
Superintendent of mine—Agent—Authority.....	30
Enforcing lien against stock—Judgment binding on coowners.....	30
Trust funds for injured miners—Mining corporation as trustee.....	30
Employee's benefit fund—Termination of purpose—Owner of surplus.....	30
Contributions to miners' relief fund—Distribution of surplus.....	31
Dissolution—Law governing.....	31
Dissolution—Existence continued.....	31
Forfeiture of charter—Power to confess judgment.....	32
Mining partnerships.....	33
What constitutes.....	33
Formation—Contribution by partners.....	33
Contract—Reformation of instrument.....	33
Conveyance of land to firm—Rights of partners.....	33
Trust relation—Proof.....	34
Fiduciary relation—Breach of duty.....	34
Fraud of partner—Procuring relocation—Liability.....	34
Right to appoint receiver.....	34
Abandonment and dissolution.....	35
Principal and agent.....	36
Duty of agent—Breach of confidential relations.....	36
General manager of coal company—Authority as agent.....	36
Proof of agency—Mine foreman acting as agent.....	36
General manager of coal mining company—Authority—Proof.....	37
Duty of agent—Disobedience—Discharge.....	37
Employment of superintendent—Discharge—Liability.....	37
Violation of contract by agent.....	37
Restraint of trade—Contract of agency for selling output of mine.....	38
Land Department.....	39
Mining entry—Continuing authority.....	39
Authority to determine character of land.....	39
Mineral character—Determination—Jurisdiction of land office and courts.....	39
Mineral character—Jurisdiction to determine—Conclusiveness of finding.....	39
Public lands.....	40
Classification—Conclusiveness of determination of land department.....	40
Mining claims.....	41
Nature and general features.....	41
Mining claim as property.....	41
Ownership of minerals.....	41

Mining claims—Continued.

	Page.
Mineral character of land.....	41
Character of land—Determination—Jurisdiction of land depart- ment	41
Sufficiency of proof.....	41
Knowledge and belief of mineral character.....	41
Land valuable for placer mining.....	42
Location of claims.....	42
Method of making.....	42
Possessory rights—Validity of location.....	42
Validity of second location.....	42
Location notice.....	42
Posting at point of discovery—Sufficient compliance.....	42
Posting at point of discovery—Insufficient compliance.....	43
Discovery	43
Conditions suggesting probability.....	43
Recitals in location notice—Presumption.....	43
Marking boundaries.....	43
Sufficiency—Identification of claim.....	43
Surface lines.....	44
Side lines—Form and direction.....	44
End lines—What constitute—Parallelism.....	44
Survey—Change of lines.....	44
Vein or lode.....	44
Ownership of veins.....	44
Fissure vein—Description and apex.....	45
Apex of vein.....	45
Location on apex—Title.....	45
Extralateral rights.....	45
Origin—What constitutes.....	45
Right to pursue vein beyond side lines.....	45
Limitations on right.....	46
Vein passing through both side lines.....	46
Direction of departing vein.....	46
Assessment work	46
Prima facie proof of performance.....	46
Proof immaterial in suit on adverse claim.....	47
Performance by coowner—Record of service of notice.....	47
Performance by coowner—Burden of proof.....	47
Notice to coowner to contribute—Time of filing—Injunction to prevent filing	48
Failure of coowner to contribute—Forfeiture—Quieting title— Prima facie proof.....	48
Abandonment.....	48
Conditional abandonment	48
Relocation	49
Validity of junior location.....	49
Invalid as to existing location.....	49
Possessory rights	49
Adverse possession—Instructions by court.....	49
Adverse possession—Period of statute of limitations.....	50

Mining claims—Continued.	Page.
Possessory actions	50
Suit by adverse claimant—Right to possession	50
Proof to sustain	50
Adverse possession—Trial of rights—Venue	50
Description	51
Description of claim—Surveyor's map	51
State statutes	51
Effect on mining locations—Statute of limitations	51
Miners' rules and regulations	51
Effect on mining location	51
Placer claims	52
Use of water	52
Adverse claim	52
Filing—Contest transferred to court	52
Amendment of statute—Practice	52
Procedure and trial—Jurisdiction of Federal and State courts ..	52
Action to determine rights—Action at law—Jury trial	53
Trial and finding of jury	53
Action by adverse claimant—Nature—Trial by jury	53
Trial by court or jury	54
Questions determined in suit	54
Proof of assessment work immaterial	54
Patents	54
Proceedings for obtaining—Conclusiveness	54
Procedure after judgment on adverse claim	55
Mineral character of land—Cancellation of entry—Notice	55
Cancellation—Mineral character of land—Subsequent discovery ..	55
Validity—Collateral attack	56
Adverse claim—Neither party entitled to patent	56
Coal locations	56
Validity of coal location	56
Cancellation of patent—Notice to officer of corporation	57
Oil locations	57
Work leading to discovery—Group claims	57
Discovery—Sufficiency—Probability not sufficient	58
Operations enjoined—Receivership	58
Trespass	58
Innocent purchaser of ore—Recovery by original owner	58
Liability for ore mined and appropriated—Damages	58
Statutes relating to mining operations.	59
Construction, validity, and effect	59
Relative duties of operator and mine foreman—Safe place	59
Application of statute—Effect of custom	59
Duties imposed on operator	60
Duty to furnish safe place	60
Safe place—Duty as to entries	60
Ventilation—Duty nondelegable	60
Keeping mine free from gas—Standard of duty	61
Ventilation—Requirement as to air	61
Duty to furnish props	61
Furnishing props—Notice of place of delivery—Proof	61
Agreement and customs—Duties relating to propping	62

Statutes relating to mining operations—Continued.	Page.
Violation by operator.....	62
Failure to employ mine foreman—Foreman for separate mines.....	62
Violation of requirement—Question of fact.....	62
Failure to furnish safe place—Liability.....	63
Structures erected by mine foreman—Duty and liability of operator.....	63
Duties imposed on mine foreman.....	64
Duty and liability of mine operator.....	64
Construction of entries—Authority of mine foreman—Knowledge of danger.....	64
Construction of passageways.....	64
Failure to perform—Liability of operator—Failure to make refuge holes.....	65
Failure to make overcast—Liability of mine operator.....	65
Presumption as agent of mine operator.....	65
Proof of relation—Foreman or superintendent—Question of fact.....	65
Violation by mine foreman.....	66
Failure to perform statutory duty—Liability of mine operator.....	66
Failure to prop roof—Operator liable.....	66
Directing miners to use dangerous entry—Liability of operator.....	66
Duties imposed on miner.....	67
Request for props—Statutory method for making.....	67
Request for props—Demand on independent contractor.....	67
Right to statutory protection.....	68
Application of statute to employee of independent contractor.....	68
Fellow-servant rule—Defense abrogated.....	68
Assumption of risk eliminated.....	68
Effect on assumption of risk.....	68
Knowledge of danger—Assurance of safety—Continuing work.....	68
Employers' liability act.....	68
Alabama employers' liability act—Purpose and construction—Competency of witness.....	68
Acceptance of provisions by employer—Notice to employee.....	69
Industrial insurance law.....	69
Indemnity insurance—Mining company's contract of indemnity—Validity.....	69
Workmen's Compensation Act.....	69
Alaska workmen's compensation act—Validity—Provisions for industrial insurance.....	69
Workmen's compensation act of Alaska—Constitutionality—Class legislation.....	70
Workmen's compensation act of Alaska—Validity—Application to minors.....	70
Beneficial construction adopted.....	71
Workmen's compensation act of Alaska—Superburden on miner.....	71
Compulsory character of act.....	71
Elective feature.....	71
Workmen's compensation act of Alaska—Insurance—Method of securing fund.....	72
Securing compensation to employees.....	72
Injury arising out of employment.....	72
Basis of compensation—Change from regular to temporary work.....	72
Claim for compensation—What constitutes—Filing.....	73

Statutes relating to mining operations—Continued.

	Page.
Workmen's Compensation Act—Continued.	
Death due to disease—Liability.....	73
Personal injury.....	73
Accident—Meaning.....	73
Extrahazardous business.....	74
Retail coal dealer—Carriage by land.....	74
Retail coal dealer—Election not to come under act.....	74
Death of son—Dependency—Cost of board.....	75
Dependents—Change of dependent's work.....	75
Allowance for hospital charges.....	75
Industrial commission—Authority and discretion.....	75
Industrial commission may require security.....	76
Industrial commission—Mandamus to enforce compliance with statute.....	76
Mines and mining operations.....	78
Relation of master and servant.....	78
Failure to prove relation.....	78
Actions—Pleading and proof of negligence.....	78
Pleading negligence—Sufficiency of complaint.....	78
Defense—Insufficient plea.....	79
Statute of limitations—Issues incomplete.....	79
Proof and presumption.....	80
Proof of injury—Inference drawn from circumstances.....	80
Proof and presumption—Use of proper care.....	80
Proof—Instructions by court.....	80
Accident as proof of negligence—Res ipsa loquitur.....	81
Trial—Instruction requested by complainant.....	81
Trial—Instruction—Theories of case.....	81
Trial—Incomplete instruction—Refusal.....	81
Failure to inspect appliance—Question of fact.....	82
Minor's ignorance of danger—Pleading excused—Change of work.....	82
Negligence of operator.....	82
What constitutes—Usages of business.....	82
Death of miner—Cause unknown.....	83
Damages by fire—Liability.....	83
Damages by fire—Proof of negligence.....	83
Discharge of inflammable fluid into furnace fire.....	84
Oil operations—Methods of pumping.....	84
Dangerous grade of dynamite.....	84
Threatened injury to real estate—No recovery for anticipated injury.....	85
Liability for injury to persons riding on car.....	85
Directing miner to work outside of employment—Failure to warn.....	85
Instructions as to negligence.....	86
Duty of operator to furnish safe place.....	86
Liability for failure—Instruction as to duty.....	86
Dangers from fire—Insufficient means of escape.....	86
Duty to provide safe appliances.....	87
Duty to furnish materials and agencies needed for removing defects.....	87
Purchase from dealer—Hazardous use—Care required.....	87
Hoist—Defective clutch bolt.....	88
Repairs—Nondelegable duty.....	88

Mines and mining operations—Continued.	Page.
Duty to inspect.....	88
Inspection—Question of fact.....	88
Tub for hoisting—Purchase from dealer—Inspection.....	88
Duty to warn or instruct.....	89
Question of fact.....	89
Change of employment—Increased danger.....	89
Delegation of duty.....	89
Duty nondelegable—Presence of employer.....	89
Change of employment—Duty not to coerce.....	89
Operator's assurance of safety.....	90
What constitutes assurance.....	90
Danger not obvious and imminent—Reliance by miner.....	90
Timberman—Assurance of safety.....	90
Contracts relating to operations.....	90
Agreement to operate continuously—Breach—Forfeiture.....	90
Modification as a new contract.....	91
Modification of contract—Statute of frauds—Specific performance.....	91
Specific performance—Statute of frauds—Part performance.....	91
Method of operating.....	92
Construction of highway—Right of individual to sue.....	92
Threatened injury to adjoining premises—Recovery.....	92
Mine foreman, vice principal, superintendent—Relation and negligence.....	93
Proof of relation—Question of fact.....	93
Superior servant—Relation.....	93
What constitutes—Vice principal.....	93
What constitutes—Authority to employ and discharge.....	93
Mine foreman as agent of operator—Proof.....	94
Difference in rank—Liability of mine operator.....	94
Negligence of vice principal—Liability of operator.....	94
Change of work—Increased hazard—Liability of operator.....	94
Servant exceeding authority—Coercing minor employee.....	95
Fellow servants—Relation—Negligence.....	95
Who are—Test.....	95
Negligence of fellow servant.....	96
Negligence of coemployees—Recovery—Pleading.....	96
Miner's working place—Safe place.....	96
Increased danger from dynamite.....	96
Contributory negligence of miner.....	97
Effect on recovery.....	97
Choice of two methods—Duty.....	97
Miner selecting dangerous method.....	97
Instinct of self-preservation.....	97
Employee doing what he was expected to do.....	98
Riding on tram car without brakes.....	98
Trip driver—Injury.....	98
Injury from dynamite—Use of high-grade explosives.....	98
Driver jumping from trip.....	99
Freedom from contributory negligence.....	99
Use of new entry.....	99
Miner acting under sudden impulse.....	100
Riding on unguarded truck.....	100

Mines and mining operations—Continued.	Page.
Assumption of risk.....	100
Risks assumed.....	100
Dangerous method of unloading coal.....	100
Change of employment—Knowledge of danger.....	100
Person riding on coal car.....	101
Risks not assumed.....	101
Injury from insecure coal buckets.....	101
Defective machinery and appliances.....	101
Superintendent's assurance of safety.....	101
Coercion by superintendent.....	102
Coercion—Fear of dismissal.....	102
Change of employment.....	102
Proximate cause of injury.....	103
Proximate cause—Proof.....	103
Contracts relating to operations.....	103
Wrongful discharge of superintendent—Liability.....	103
Independent contractor.....	103
Injury—Liability of mine operator.....	103
General instructions—Independent contractor.....	104
Right to surface support.....	104
Right to mine servient to surface ownership.....	104
Injunction—Dissolution.....	104
Nuisance.....	104
Mine refuse—Pollution of waters.....	104
Mining leases.....	105
Leases generally—Construction.....	105
Construction—Maturity of deferred payment.....	105
Construction—Compromise and settlement—Consideration for drilling.....	105
Failure of lessee to operate—Forfeiture.....	105
Diamond lease—Continuous operations.....	106
Lease to mine diamonds—Diligence in developing.....	107
Power of executrix to lease—Disposition of royalties.....	107
Lessee not purchaser of ore in place.....	107
Abandonment—Right to cancellation.....	108
Forfeiture—Violation of statutory provision.....	108
Coal leases.....	108
Construction—Removal of all coal—Termination of lease.....	108
Minimum royalty—Liability of lessee—Termination of lease.....	108
Recovery of minimum royalty—Defense.....	109
Right of lessee to remove mining machinery.....	109
Lease by guardian—Duration—Validity of statute.....	110
Abandonment—Right of lessor to take possession.....	111
Cancellation of patent—Bona fide purchaser.....	111
Oil and gas leases.....	111
Construction—Land owner protected.....	111
Construction—Effect given to all parts.....	111
Construction—Reasonable construction adopted.....	112
Construction—Ambiguous terms—Intention of parties.....	112
Construction and consideration.....	112
Construction—Successive extensions of time—Consideration.....	113
Construction—Period of duration.....	113
Construction—Period of existence—Payment of rentals.....	113

Mining leases—Continued.

	Page.
Oil and gas leases—Continued.	
Construction—Use of technical words—Parol evidence to explain.	114
Construction—Nature of estate granted.	114
Nature—No estate granted.	114
Contract for exploration of land for oil and gas.	114
Construction—Drilling well—Meaning of completed well.	115
Construction—Completed well—Meaning.	115
Construction—Suspension of drilling—Forfeiture.	115
Construction—Effect of surrender clause—Rights of lessee.	116
Construction—Right of possession—Injunction.	116
Consideration—Unilateral contract—Who may question.	117
Construction—Net profits and net proceeds.	117
Construction—Right of lessor to gas from oil wells.	117
Nature and construction—Lessee's right to possession.	117
Construction—Implied covenant to develop.	118
Implied obligation to develop—Intention of parties.	118
Covenant to develop not implied.	119
Consideration and validity—Implied covenant.	119
Failure to develop—Right of second lessee to terminate first lease.	119
Failure to drill—Remedy of lessor.	119
Option to develop oil land—Failure to develop.	120
Contract to drill or pay rental—Lessor's option.	120
Breach of contract to drill—Measure of damages.	120
Breach—Liquidated damages or penalty.	121
Lease of minerals—Right to use of surface.	121
Construction—Consent to drill—Consent of assignee not required.	122
Drilling with consent of both parties—Covenant running with land.	122
Right of renewal—Disposition of deposit.	122
Right of renewal—Payment or deposit of rentals.	123
Acceptance of delay rentals—Forfeiture—Validity of second lease.	123
Acceptance of rentals by married woman—Right to forfeiture—Estoppel.	123
Power of lessees to mortgage.	124
Proof of value of lease—Opinion of witness.	124
Lease by one tenant in common—Fraud.	124
Ownership of oil well—Presumption.	124
Purchase pending suit—Conclusiveness of judgment.	125
Appointment of receiver—Jurisdiction.	125
Liability of agent—Undisclosed principal.	125
Cancellation—Recovery of lieu payments.	126
Forfeiture—Lessor.	126
Forfeiture—Reasonable opportunity for preventing.	126
Forfeiture—Exception to rule.	127
Mining properties.	128
Taxation.	128
Classification of property for taxation.	128
Mining interests taxable.	128
Valuation of mineral lands—Errors of judgment.	128
Valuation for assessment—Mineral interest.	128
Equality in valuation—Constitutional protection.	129

Mining properties—Continued.

Taxation—Continued.	Page.
Increased valuation—Validity of assessment.....	129
Valuation of separate estates—Assessment as a unit.....	129
Separate assessment or sale of undivided interest—Validity.....	130
Authority of county treasurer—Omitted property.....	130
Assessment of omitted property—Nature of proceeding.....	130
Franchise tax—Annual license fee.....	130
License tax on mining.....	130
License tax on oil and gas business.....	131
Corporation excise tax—Deductions from income.....	131
Corporation excise tax—Income from sale of stock—Method of computing.....	131
Corporation excise tax—Sale of stock—Income.....	132
Forfeited lands—Suit by State to sell—Pleading.....	132
Taxation prevents forfeiture.....	133
Liens.....	133
Sale or rental of minerals—Lien for royalties—Place of en- forcing.....	133
Fixtures.....	133
Pipes used in hydraulic mining.....	133
Judicial sale of fixtures—Validity.....	134
Insurance and loss.....	134
Liability and recovery.....	134
Trust.....	134
Diversion of trust fund.....	134
Quarry operations.....	135
Contributory negligence—Customary method of work—Obeying orders.....	135
Negligence—Excessive blast.....	135
Use of explosives—Injury from blasting—Inference of negligence.....	135
Blasting—Care required—Liability—Proof.....	135
Use of dynamite—Care required.....	136
Damages for injuries to miners.....	137
Elements of damages.....	137
Damages for future pain and suffering.....	137
Damages not excessive.....	137
Instances.....	137
Damages excessive.....	137
Instances.....	137
Interstate commerce.....	138
Taxation of product of mine.....	138



TABLE OF CASES DIGESTED.

A.

	Page.
Allen v. Marver, — Cal. —, 172 Pac. 980-----	120, 121
American Smelting & Refining Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 248 Fed. 172-----	4, 5
Amok Gold Min. Co. v. Canton Insurance Office, — Cal. App. —, 171 Pac. 1098----	134
Arnold v. Garnett Light & Fuel Co., — Kan. —, 172 Pac. 1012-----	114

B.

Bartlettsville Zinc Co. v. Compania Minera Ygnacio Rodriguez Ramos, — Tex. Civ. App. —, 202 S. W. 1048-----	7
Basse v. Banner Coal Co., — Mich. —, 167 N. W. 954-----	73
Batt v. Steadman, — Cal. App. —, 173 Pac. 99-----	41, 42, 43, 44, 50, 51
Beatty v. Guggenheim Exploration Co., — N. Y. —, 119 N. E. 575-----	36, 38
Beauchamp v. Bertig, 90 Ark. 350, 119 S. W. 75-----	110
Borderland Coal Co. v. Kirk, — Ky. —, 203 S. W. 534-----	59, 60, 62, 67, 68, 90
Bradley v. Holliman, — Ark. —, 202 S. W. 469-----	91, 103
Breunann v. Hunter, — Okla. —, 172 Pac. 49-----	114, 116, 117, 118, 119, 126
Bundy v. Petroleum Products Co., — Kan. —, 172 Pac. 1020-----	73, 75
Burch v. Conklin, — Mo. App. —, 204 S. W. 47-----	37, 103

C.

Cabin Valley Min. Co. v. Mary Hall, — Okla. —, 155 Pac. 570-----	110
California Mining States Annotated, 140-----	48
Campbell's Estate, In re, — Utah —, 173 Pac. 688-----	107, 134
Carlson v. Mid-Continent Development Co., — Kan. —, 173 Pac. 910-----	18
Central Iron & Coal Co. v. Hammacher, 248 Fed. 50-----	69
Choctaw Coal & Mining Co. v. Dodd, — Ala. —, 79 So. 54-----	79, 87
Clark v. Choctaw Min. Co., — Ala. —, 78 So. 372-----	61, 62, 67, 68, 78
Cole v. D. C. & E. Min. Co., — Mo. App. —, 204 S. W. 197-----	82, 87, 89
Consolidated Interstate-Callahan Min. Co. v. Witkouski, 249 Fed. 833----	88, 94, 95, 101
Consumers' Lignite Co. v. James, — Tex. Civ. App. —, 204 S. W. 719-----	37, 103
Costello v. Gleason, — Ariz. —, 172 Pac. 730-----	33, 34, 35
Cossette v. Paulton Coal Min. Co., — Pa. —, 103 Atl. 346-----	64, 65, 67, 99

D.

De Moss v. Sample, 143 La. —, 78 So. 482-----	10, 13, 14, 115, 121, 124, 128, 131
Dickensheet v. Chateau Min. Co., — Mo. App. —, 202 S. W. 624-----	21, 92, 104
Dickson v. Southern Pacific Co., — Nev. —, 172 Pac. 368-----	6, 7, 8
Dilley v. Primos Chemical Co., — Colo. —, 171 Pac. 1146-----	96, 97, 98

E.

Elkhorn Min. Corp. v. Paradise, — Ky. —, 203 S. W. 291-----	95, 96
Engberd v. Victoria Copper Min. Co., — Mich. —, 167 N. W. 840-----	75

F.

Farmers' Petroleum Co. v. Shelton, — Tex. —, 202 S. W. 194-----	69, 137
Faught v. Leth, — Ala. —, 78 So. 830-----	104
Fiscal Court, etc. v. Kentucky Public Service Co., — Ky. —, 204 S. W. 77-----	18
Fisher v. Maple Block Coal Co., — Iowa —, 168 N. W. 110-----	20, 108, 109
Frost v. Martin, — Tex. Civ. App. —, 203 S. W. 72-----	114, 115
Fruit v. Industrial Board, etc., — Ill. —, 119 N. E. 931-----	74

	Page.
Gem Oil Co. v. Callendar, — Okla. —, 173 Pac. 820.....	15, 105
Globe & Rutgers v. Prairie Oil & Gas Co., 248 Fed. 452.....	16, 17
Graves v. Union Oil Co., — Cal. App. —, 173 Pac. 618.....	80, 84, 97, 103
Griffen v. Bell, — Tex. Civ. App. —, 202 S. W. 1034.....	112, 115, 120

H.

Hallawell v. Union Oil Co., — Cal. App. —, 173 Pac. 177.....	80, 84, 87, 97, 103
Harden v. Southern Surety Co., — Mo. App. —, 204 S. W. 34.....	29, 69
Hays v. Gauley Mountain Coal Co., 38 Supreme Ct. Rep. 470.....	132
Helm v. Brock, — Ark. —, 202 S. W. 36.....	110, 111
Henriod v. East Tintic Development Co., — Utah —, 173 Pac. 134.....	32
Hodge v. Sycamore Coal Co., — W. Va. —, 95 S. E. 808.....	81, 85, 100, 101
Hughes v. Busseyville Oil & Gas Co., — Ky. —, 203 S. W. 515.....	111, 113, 118, 119, 127
Huston v. Cox, — Kan. —, 172 Pac. 992.....	33, 34, 114, 125

I.

Indian Creek Coal & Min. Co. v. Calvert, — Ind. App. —, 119 N. E. 519.....	20, 72, 73, 74
Industrial Commission v. Daly Min. Co., — Utah —, 172 Pac. 301.....	71, 72, 76, 77

J.

Jaggie v. Davis Collieries Co., 75 W. Va. 370, 84 S. E. 941.....	66
Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Ct. Rep. 574.....	44, 45, 46
Johnson v. Rouchleau-Ray Iron Land Co., — Minn. —, 168 N. W. 1.....	85, 93
Johnston v. Connecott Copper Corp., 248 Fed. 407.....	70, 71, 72

K.

Kelvin Lumber & Suply Co. v. Copper State Min. Co., — Tex. Civ. App. —, 203 S. W. 68.....	3, 6, 7, 41, 42, 49, 51, 53
Kennedy v. Hicks, — Ky. —, 203 S. W. 318.....	3, 9, 105, 133
Kentucky Block Cannel Coal Co. v. Sewell, 249 Fed. 840.....	10, 11, 33
Kidd v. Coahuila Lead & Zinc Co., — Mo. App. —, 204 S. W. 284.....	83
Kinder v. Boomer Coal & Coke Co., — W. Va. —, 95 S. E. 580.....	65, 66, 78, 79, 80, 82, 86, 89, 93, 94, 95, 101, 102
Kirk v. Olson, 38 Supreme Ct. Rep. 114.....	39, 55
Kittilsby v. Vevelstadt, — Wash. —, 173 Pac. 744.....	34
Kolalsky v. Delaware & Hudson Co., — Pa. —, 103 Atl. 721.....	62, 66, 90, 93, 100, 102
Kramer v. Gypsy Oil Co., — Okla. —, 173 Pac. 802.....	130

L.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404.....	39, 40, 41, 42, 54, 55
Last Chance Min. Co. v. Tuckahoe Min. Co., — Mo. App. —, 202 S. W. 287.....	33, 91, 92
Lawbaugh v. McDonnell Min. Co., — Mo. App. —, 202 S. W. 617.....	81, 82, 88
Lawrence E. Tierney Coal Co. v. Smith, — Ky. —, 203 S. W. 731.....	110
Letcher v. Maloney, — Okla. —, 172 Pac. 972.....	121, 125

M.

Malze v. Big Creek Coal Co., — Mo. App. —, 203 S. W. 633.....	21, 98, 99
Mallen v. Ruth Oil Co., 231 Fed. 845.....	110
Matson v. Connecott Min. Co., — Wash. —, 171 Pac. 1040.....	31, 32
Mauney v. Millar, — Ark. —, 203 S. W. 10.....	107, 108
McCreary v. Billing, 176 Ala. 314, 58 So. 311.....	110
McFarlane v. Gulf Production Co., — Tex. Civ. App. —, 204 S. W. 460.....	122
McMillan v. Connor, — W. Va. —, 95 S. E. 642.....	16, 124
Meade v. Steele Coal Co., — Ky. —, 203 S. W. 1061.....	56
Miller v. Belvy Oil Co., 248 Fed. 83.....	125
Monarch Gas Co. v. Roy, — W. Va. —, 95 S. E. 789.....	123
Montana Coal & Oil Co. v. Haskins, — Ore. —, 172 Pac. 118.....	30
Mutual Oil Co. v. Hills, 248 Fed. 257.....	25, 26

N.

	Page.
Nathan v. Porter, — Cal. App. —, 172 Pac. 170.....	112, 117
North American Coal & Coke Co. v. O'Neal, — W. Va. —, 95 S. E. 822.....	9, 22, 23
Northrop-Bell Oil & Gas Co., In re, — Okla. —, 171 Pac. 1116.....	29

O.

Old Dominion Copper Min. & Smelting Co. v. State Board of Taxes, etc., — N. J. —, 103 Atl. 690.....	130
Oolitic Stone Mills Co. v. Cain, — Ind. App. —, 119 N. E. 1005.....	68, 135

P.

Peebles v. Georgia Iron Coal Co., 248 Fed. 886.....	12
Peden Iron & Steel Co. v. Jenkins, — Tex. Civ. App. —, 203 S. W. 180—13, 23, 24, 27, 124	
Picino v. Utah-Apex Min. Co., — Utah —, 173 Pac. 900.....	86, 137
Producers' Coal Co. v. Miffin Coal Min. Co., — W. Va. —, 95 S. E. 948— 13, 30, 36, 37, 80	
Pure Oil Operating Co. v. Gulf Refining Co., 143 La. —, 78 So. 560.....	116, 122, 123

Q.

R.

Rafferty v. Davis, — Pa. —, 103 Atl. 951.....	135, 136
Ralph v. Cole, 249 Fed. 81.....	43, 49, 50, 51, 52, 53, 54, 55, 56
Ramage v. Producers' & Refiners' Oil Co., — Pa. 103 Atl. 336.....	83, 84
Ramey v. Stephney, — Okla. —, 173 Pac. 73.....	13, 15
Raydure v. Lindley, 249 Fed. 675.....	119
Red Eagle Coal Co. v. Thrasher, — Ala. —, 78 So. 718.....	63, 103, 104
Ricardi v. Gabouri, 115 Tenn. 485, 89 S. W. 98.....	110
Robinson v. Griest, — Cal. —, 173 Pac. 88.....	47, 48
Roberts v. Oechsli, — Mont. —, 172 Pac. 1037.....	47, 54
Roseburg National Bank v. Camp, — Oreg. —, 173 Pac. 313.....	20, 52, 133, 134
Russell v. Producers Oil Co., 143 La. —, 78 So. 473.....	125

S.

Segrest v. Roden Coal Co., — Ala. —, 78 So. 756.....	60, 61
Sloss-Sheffield Steel & Iron Co. v. Crosby, — Ala. —, 78 So. 898.....	20, 78, 98
Southern Pacific Co. v. United States, 249 Fed. 785.....	8, 19, 20, 42, 43, 56, 58
State v. Guffey, — W. Va. —, 95 S. E. 1048.....	14, 129, 130, 133
State v. Independence Gas Co., — Kan. —, 172 Pac. 713.....	18
Stevirmac Oil & Gas Co. v. Dittman, 38 Supreme Ct. Rep. 116.....	29
Stien v. Producers' Oil Co., — Tex. Civ. App. —, 203 S. W. 126.....	116, 126, 127
Strother v. United States Coal & Coke Co., — W. Va. —, 95 S. E. 806.....	36, 65, 94
Sugar Valley Coal Co. v. Drake, — Ind. App. —, 117 N. E. 937.....	74
Sunday Lake Iron Co. v. Wakefield Township, 38 Supreme Ct. Rep. 495.....	128, 129

T.

Terleski v. Carr Coal Min., etc. Co., — Kan. —, 173 Pac. 8.....	84, 97, 99
Thurmond v. Paragon Collieries Co., — W. Va. —, 95 S. E. 816.....	25, 28, 29, 38

U.

Union Sulphur Co. v. Reed, 249 Fed. 172.....	128, 131, 138
United States v. Biwabik Min. Co., 38 Supreme Ct. Rep. 462.....	107, 131
United States v. Honolulu Consolidated Oil Co., 249 Federal 167.....	15, 57, 58
United States v. Kirk, 248 Fed. 30.....	11, 56
United States Mining Statutes Annotated, 447.....	52, 54, 57
Underwood v. Robinson, — Tex. —, 204 S. W. 314.....	108
United States v. Routt County Coal Co., 248 Fed. 485.....	11, 57, 111

V.

Victor American Fuel Co. v. Melkusch, — N. M. —, 173 Pac. 198.....	81
--	----

W.

	Page.
Walsh v. Klienschmidt, — Mont. —, 173 Pac. 548-----	49
Walters v. Pittsburgh, etc., Iron Co., — Mich. —, 167 N. W. 834-----	30, 31
Western Oil Refining Co. v. Commonwealth, — Ky. —, 202 S. W. 636-----	27, 28
Whittaker v. Valley Camp Coal Co., — Pa. —, 103 Atl. 594-----	59, 60, 63, 64, 137
Williams v. Thacker Coal & Coke Co., 44 W. Va. 599, 30 S. E. 107-----	66
Witherington v. Gypsy Oil Co., — Okla. —, 172 Pac. 634-----	112, 117
Woldson v. Richmond Min., Smelting, etc. Co., — Wash. —, 172 Pac. 1162-----	25

Y.

Yellow Rose Min. Co. v. Strait, — Ark. —, 202 S. W. 691-----	80, 86, 96, 97, 100, 101
--	--------------------------

ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING.

MAY TO SEPTEMBER, 1918.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

MINERALS.

NATURE AS PERSONAL PROPERTY.

Ore after having been mined and removed from the earth is personal property.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 69.

NATURE AS LAND—CONVEYANCE.

Minerals are land so long as they are undisturbed and must be conveyed with the same formalities as other lands are conveyed.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

CONVEYANCE OF MINERALS—SEVERANCE.

The owner of both the minerals and the land may convey the minerals, in which case the corpus passes and thereby a severance is effected, the vendor remaining the owner of that part of the land which does not consist of minerals and the vendee owning the land which consists of minerals.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

CONVEYANCE—EFFECT AS CONSUMMATED SALE.

The owner of land may convey the minerals upon the condition that the vendee extract them by a specified time or in a stipulated mode or that title shall pass only when certain royalties be paid, and in such instance there is no present consummated sale.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

SALE OF ORE—SPECIFIC PERFORMANCE OF CONTRACT.

A mining company for a period of 12 years had been selling its ore to a certain smelting company for the purpose of obtaining a continuous and steady market for its ore and for the purpose on the part of the smelting company of obtaining a continuous and steady supply of ore for smelting; an agreement was entered into by which the mining company agreed to sell and the smelting company agreed to purchase at ruling prices all the ore produced by the mining company of certain stated grades, and to this end the mining company agreed to actively operate its mines. It is no longer the rule that a suit will not lie for the specific performance of a contract relating to personal property; but the question for determination in such a case is whether the complainant has a plain, speedy and adequate and complete remedy at law, and if he has no such remedy, specific performance will be granted. In an action by a smelting company for the specific performance of a contract of sale it appeared that the ore produced by the mining company had a peculiar value for smelting purposes and was not readily obtainable elsewhere, and it would be practically impossible to measure the value for determining the loss the complainant would sustain if the smelting company were not able to obtain the ore under the contract. It is comparatively simple for a court of equity to enforce the agreement as it pertains to the normal product of the mine and there is no plausible reason why a court may not require a performance on the part of the mining company where the mining company obligated itself to operate all its mines. There is no delicate or complex condition involved in the production or delivery of the ore or in obtaining the stipulated prices agreed upon, and there is nothing apparent that will necessitate supervisory control in requiring performance on the part of the mining company. A decree for specific performance would require no supervision by the court either for the operation of the mines or for ascertaining and fixing the prices the mining company is to receive for its ore.

American Smelting & Refining Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 248 Federal 172, p. 182.

BREACH OF CONTRACT FOR SALE OF ORE—PRELIMINARY INJUNCTION.

A mining company agreed to sell all of its ore, and a smelting company agreed to purchase all of the ore of the mining company of a certain designated grade at ruling prices. The evident purpose of the agreement was to afford the mining company a regular and steady market for its ores and to supply the smelting company with a ready and steady product for smelting. In a suit by the smelting company to enforce specific performance of the contract and to enjoin the

mining company from breaching the contract and ceasing to sell to the smelting company the product of its mines, a court in an application for a preliminary injunction will not pass upon the sufficiency of the bill except to inquire whether the questions presented are grave and weighty and difficult of solution and such as to call for a maintenance of the status quo during the pendency of the litigation.

American Smelting & Refining Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 248 Federal 172, p. 182.

AGREEMENT TO PURCHASE ORE—INJUNCTIVE RELIEF.

A mining company on March 20, 1905, entered into an agreement with a smelting company whereby it agreed to sell and the latter to purchase all the lead-silver ores, slimes, and concentrates mined from the property of the mining company at agreed prices, with certain stipulated deductions. The contract provided that the ore should be of a lead assay of between 30 per cent and 75 per cent, and that the average product should be of approximately the same yearly analysis and lead assay as the shipments made from the mine during any year of the 12 years immediately preceding the date of the agreement, and this standard should not be varied unless the smelting company gave its written consent, and in case there was a variation from the standard the smelting company was to be given an option to purchase at the best going market rates and terms. The purpose of the agreement on the part of the smelting company was to secure as nearly as practical a uniform product of an average of about 53 per cent lead assay, and it was the intention of the parties as shown by the agreement that the mining company should sell and the smelting company should purchase the entire product, and it was the purpose of the mining company to have a continuing and suitable market for its normal and usual output and that the smelting company should have a dependable source of supply of a reasonably uniform commodity for its smelting operations. Under such a contract and where it appears that the mining company has constructed a smelter of its own for the purpose and with the intention of smelting its own ores and repudiated the contract to sell its ore to the smelting company, the latter is entitled to a preliminary injunction to maintain the status quo when it is shown that there is a probable right and a probable danger that such right will be defeated without the immediate interposition of a court of equity. Such injunctive relief will be granted whenever the question of law or fact to be ultimately determined is grave and difficult and injury to the moving party will be immediate, certain, and great if denied, while loss and inconvenience to the opposing party will be comparatively small if granted.

American Smelting & Refining Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 248 Federal 172, pp. 175-182.

CONVERSION OF ORE.

The rule that it constitutes conversion to receive property from one wrongfully in possession of it and thereafter exercise dominion or control over it contrary to the wish of the person rightfully entitled to it applies to ores or minerals as well as to other property. But the rule does not apply to a common carrier, and the carrying of goods or ores by a carrier from terminus to terminus upon the requirement of a person unlawfully in possession of them is not conversion.

Dickson v. Southern Pacific Co. (Nevada), 172 Pacific 368, p. 369.

CONVERSION OF ORE BY CARRIER—NOTICE OF OWNERSHIP.

The owner of certain ores notified a railroad company that a particularly named person would offer ore for transportation and forbade the transportation of the ore if offered by the person named. The person named did offer the ore for transportation and the railroad company required of him an affidavit of ownership, and upon such affidavit being made the railroad company received and shipped the ore. The fact that the railroad company required the affidavit of ownership was sufficient to show that it had notice of the claim of the alleged owner of the ore and was sufficient to render the railroad company liable on a charge of converting the ore.

Dickson v. Southern Pacific Co. (Nevada), 172 Pacific 368, p. 369.

CONVERSION—RECOVERY BY OWNER.

Minerals after they are taken from the mine and from the real estate wherein they are found become personal property, and where there has been a wrongful conversion the owner may sue in any State where the minerals are found and recover either the minerals themselves or the value thereof.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 69.

CONVERSION OF ORE—MEASURE OF DAMAGES.

In an action by the owner of ore against a railroad company for damages for an alleged conversion of ore, the measure of damages is the value of the ore at the time of the conversion with legal interest from the date of the conversion to the date of rendering judgment.

Dickson v. Southern Pacific Co. (Nevada), 172 Pacific 368, p. 369.

The measure of damages for a conversion of ore or minerals is the market value of the ore at the time and place of conversion.

Barletttsville Zinz Co. v. Compania Minera Ygnacio Rodriguez Ramos (Texas Civil Appeals), 202 Southwestern 1048.

See Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68.

TRESPASS AND CONVERSION—JURISDICTION AND VENUE.

The owner of a valid mining location can not maintain an action in the court of a foreign State to recover the value of minerals from the purchaser of the same from a person who had in good faith made an attempted relocation of a part of the ground included in the original location, and who was in the adverse possession of that part of the mining claim under his relocation; and as such relocater mined and removed the minerals from his relocated claim, such an action necessarily involves the title to the realty and it is the policy of the law that such an issue should be tried in the local court where the property is situated.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 70.

MILITARY SEIZURE.

A mining company sued for damages for the conversion of ore, alleging that the ore was taken from the complainant in the Republic of Mexico by unknown parties and subsequently unlawfully appropriated by the defendant company. The defendant pleaded that the ore was seized and confiscated by Francisco Villa as a military necessity, was sold to parties in Mexico and subsequently purchased by the defendant in good faith. An issue was formed on the defendant's plea and the jury found as a fact that a civil war existed in Mexico, but that the ore was not taken by any force or government in possession and control of the territory, or by any agent of such force or government acting by authority of the government, and that the proceeds derived from the ore were not intended for the benefit of the faction dominated by Villa. This was a question of fact entirely within the province of the jury and its finding is binding on the court.

Barletttsville Zinc Co. v. Compania Minera Ygnacio Rodriguez Ramos (Texas Civil Appeals), 202 Southwestern 1048.

EXTRACTION OF MINERAL FROM ORE—JUDICIAL NOTICE.

Court can not take judicial notice of what percentage of mineral can be extracted from a particular class of ore, but this is a matter of proof in each particular case.

Dickson v. Southern Pacific Co. (Nevada), 172 Pacific 368, p. 370.

PROCESS OF TREATING ORES—JUDICIAL NOTICE.

Courts will take judicial knowledge of the fact that processes of crushing, amalgamating, and cyaniding ores will not effect an extraction of 100 per cent of the metallic content. What will be a reasonable percentage of extraction will depend largely upon the process used and the character of the ore.

Dickson v. Southern Pacific Co. (Nevada), 172 Pacific 368, p. 370.

MINERAL LANDS.

MINERAL CHARACTER OF PUBLIC LAND—SELECTION BY RAILROAD COMPANY—KNOWLEDGE OF AGENT.

A railroad company selecting nonmineral lands under its grant was required to attach to its selection list an affidavit by its agent to the effect that the lands mentioned had been examined by the agents and employees of the company as to their mineral and agricultural character and that the lands selected were not mineral lands. In an action to set aside a patent to lands so selected on the ground that the land was in fact mineral in character, the agent in making the substantive representations as to the character of the land is chargeable with knowledge of all the conditions which a careful examination if made would have disclosed, including everything that was known to the company's geologist and other agents or employees.

Southern Pacific Co. v. United States, 249 Federal 785.

SALE AND CONVEYANCE.

CONVEYANCE OF MINERALS IN PLACE.

A written instrument called a lease provided that the first parties in consideration of the stipulations and covenants contained lease, demise, and let unto the party of the second part for the sole and only purpose of quarrying, drilling, and digging for minerals and oils, the exclusive right to a certain tract of land described for a term of 99 years. The consideration to be paid was \$200 cash and \$300 within six months after commencing quarrying, mining, or drilling for minerals or oil. The land described was in Hardin County, Ky. The grantee lived in Jefferson County and subsequently assigned or conveyed his interest in the premises to a stone company that began quarrying stone on the premises. On failure to make the deferred payment, the grantor or lessor brought suit in Hardin County to enforce a vendor's lien against the land making the original grantee and his assignee parties defendant. The original grantee, a resident of a different county, denied the jurisdiction of the court over his

person on the ground that the action was transitory and he must be sued in the county of his residence. The correctness of this proposition depends on whether the instrument was merely a lease of the land with the privilege of removing the minerals during a certain period, or was in reality a sale of the land. When a contract employs the language and observes the formality required for conveyances of real estate and the consideration is paid or made payable before severance the contract is a sale of real property; but when a consideration is payable after the severance the contract may be a sale or an agreement to sell realty or personalty depending upon the language employed. The language of this instrument is sufficient to convey title to real estate. A part of the consideration was paid in cash and the balance payable upon the happening of a contingency other than the removal of the minerals, and there are no provisions for further payments of any kind either as rent or royalty. The instrument conveyed to the original grantee the minerals as land and as the action was to subject real estate to a lien for a part of the unpaid purchase money it was not transitory but local to Hardin County, where the land was located, and the original grantee was a necessary party and properly in court.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

LIEN FOR PURCHASE MONEY—PLACE OF ENFORCEMENT.

Where the conveyance of minerals vests the title to such minerals in the vendee and retains a lien for unpaid purchase money due and payable before the severance of the minerals from the real estate, then an action to enforce the vendor's lien by a sale of the minerals while a part of the land is local to the county where the land is located under the statute of Kentucky.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

FRAUD—PRESUMPTION FROM RELATIONSHIP OF PARTIES.

Dealings in the purchase and conveyance of mineral lands between persons standing in the relationship of brother-in-law and sister and affecting injuriously the rights of others are not presumably fraudulent, but such relationship when fraud is charged calls upon a court for a careful and close scrutiny of the transactions and conduct of and evidence offered by the parties, and when the transactions involved the payment of large sums of money the testimony of such parties when uncorroborated by receipts, memoranda, or other documentary evidence must be clear, positive, definite, and consistent with other evidence offered and free from contradiction.

North American Coal & Coke Co. v. O'Neal (West Virginia), 95 Southeastern 822, p. 826.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.**METHOD OF SEVERANCE.**

A severance of the surface and the minerals or mineral interest may be by conveyance of the mines or minerals only; or by a conveyance of the land with a reservation or exception as to the mines or minerals.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 486.

SALE OR RESERVATION OF MINERALS—NATURE OF ESTATE.

A sale or reservation of mineral rights does not constitute a sale or reservation of so many tons of coal, iron ore, barrels of oil or feet of gas; but a grant may convey or reserve the exclusive right to explore the property for any of the minerals designated in the act of conveyance or reservation. To say that such a contract is void for lack of certainty as to the things sold or reserved, or contrary to any principle of public policy of the State, would relegate the most valuable property in the State to the category of property *de hors commerce*.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 484.

CONVEYANCE OF SURFACE AND RESERVATION OF MINERALS.

The owner of land may sell the surface rights and except from the sale the mineral below the surface and reserve to himself the right to mine such minerals, whether the minerals be in place, as coal, or whether they be migratory, like oil and gas.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 483.

EXCEPTION OR RESERVATION.

A reservation or exception of the minerals in a tract of land conveyed is a separation of the estate in the minerals from the estate in the surface, and it makes no difference whether the word used is "excepted" or "reserved."

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 486.

POSSESSION OF SURFACE.

Where the ownership of minerals has been severed from the ownership of the surface, the possession of the latter does not necessarily carry with it possession of the minerals.

Kentucky Block Cannel Coal Co. v. Sewell, 249 Federal 840, p. 847.

ADVERSE POSSESSION OF MINERALS—STATUTE OF LIMITATIONS.

The statute of limitations does not begin to run against the title to minerals until the adverse possession thereof is taken by another; and the bar of the statute would not be complete unless and until the adverse possession was continued for the full statutory period.

Kentucky Block Cannel Coal Co. v. Sewell, 249 Federal 840, p. 847.

ADVERSE POSSESSION OF COAL—EFFECT ON OWNERSHIP OF OIL AND GAS.

The fact that the owner of the surface of land took possession and mined coal for such length of time as would give title to the coal by adverse possession would not of itself give the surface owner title to oil and gas deposits not then known to exist as against a prior grantee of all mineral rights in the land.

Kentucky Block Cannel Coal Co. v. Sewell, 249 Federal 840, p. 847.

COAL AND COAL LANDS.

COAL LOCATION—CANCELLATION OF PATENT—BONA FIDE PURCHASER.

The United States brought suit to cancel on the ground of fraud a patent issued for coal land. The defendant pleaded that he was an innocent purchaser and purchased the land from a trustee for value and without any knowledge of fraud on the part of the entryman. Under such a plea the burden of proof is on the defendant to sustain the allegations of his plea and to show that he was an innocent purchaser for value. A purchaser who pays his money with knowledge of facts which if investigated would lead to the knowledge of the fraudulent entry is not an innocent purchaser.

United States v. Kirk, 248 Federal 30, p. 35.

United States v. Routt County Coal Co., 248 Federal 485.

FRAUD—CANCELLATION OF PATENT—DATE OF RECEIVER'S RECEIPT.

In an action by the United States to cancel a patent to certain coal lands on the ground of fraud the fact that the receiver's receipt bears a date subsequent to the patent and to the deed by the patentee conveying the land to another, cannot be taken as conclusive on the subject of constructive notice to subsequent purchasers and such a circumstance would not be sufficient to put a purchaser upon inquiry within any sound rule of law.

United States v. Routt County Coal Co., 248 Federal 485, p. 487.

SALE AND CONVEYANCE—FRAUDULENT REPRESENTATIONS—RESCISSION OF CONTRACT.

The Georgia Iron & Coal Company sold to the Georgia Steel Company a tract of 52,000 acres of land containing coal and iron, one furnace, a railroad and its equipment, and other property used in

operating the mine. The purchasing company took possession and continued to develop the property for five years, making partial payments of the purchase money without complaint or objection. Later, believing that false representations were made by the agents of the seller as to the quantity of iron and coal deposits, a suit was brought to rescind the contract on the ground of fraud. In order for a defrauded party to make a proper plea to a court of equity to rescind a contract on the ground of fraud or misrepresentation there must not only be a material misrepresentation intended to mislead and having that effect, but action must be taken as soon as facts are discovered that give notice of the fraud. The purchaser continued after it had an opportunity to know as much as any one knew to take the chances. A person who speaks tardily to a court of equity must speak convincingly.

Peoples v. Georgia Iron & Coal Co., 248 Federal 886, p. 891.

SALE—SECRET COMMISSION TO OFFICER OF PURCHASING CORPORATION—
FRAUD AND RESCISSION.

It is a rule of law that when a person by the payment of secret commission, corrupts an officer or employee of the purchasing person or corporation the sale may be set aside at the suit of the latter. But the payment by a selling company of a commission to an officer of the purchasing corporation carries with it only one right in equity and that is to rescind the contract. The buyer has the option to avoid the sale, but he must act promptly after ascertaining the fact and so long as he is in a position where he can restore the original status the purchaser may invoke the remedy of rescission. But this right to rescission does not carry with it any right of readjustment of price. The payment of corrupt commissions is a character of fraud that has no relation to price; and equity will not relieve by rescission a contract after a delay of five years with knowledge of the facts.

Peoples v. Georgia Iron & Coal Co., 248 Federal 886, p. 892.

CONTRACT FOR SALE OF COAL—CONSIDERATION—COMPROMISE OF DOUBTFUL RIGHTS.

The settlement of controverted matters arising out of a contract by a coal-mining company for the sale of all the coal mined by it was a sufficient consideration for a new and different contract, and in an action involving the rights of the parties growing out of the new relation it is not admissible to go back of the compromise or settlement in order to determine which party was right in its contention. When a compromise of a doubtful right is fairly made between the

parties to a contract it is binding and can not be affected by any subsequent investigation or result. The rule applies whether the compromise was of a doubtful question of law or fact.

Producers' Coal Co. v. Miffin Coal Min. Co. (West Virginia), 95 Southeastern 948, p. 951.

OIL AND OIL LANDS.

OIL AND GAS AS MINERALS.

Oil and gas in place are minerals.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 485.

NATURE AND CHARACTERISTICS OF OIL—REDUCING TO POSSESSION.

Oil and gas are substances of a peculiar character and decisions of ordinary cases of mining for coal and other minerals that have a fixed situs can not be applied to contracts concerning oil and gas without some qualifications. Oil and gas belong to the owner of the land and are a part of it so long as they are on it or in it or subject to the owner's control; but when they escape and go into other land or come under another's control, the title of the former owner is gone. Where an adjoining owner drills a well on his own land and taps a deposit of oil and gas extending under his neighbor's land so that it comes into his well it then becomes his property.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 485.

LANDS VALUABLE FOR OIL—PROOF OF VALUE.

In an action to determine the value of oil lands or of an oil lease of a tract of land on which there was a flowing well, it is proper to show the value of an oil lease on an adjoining tract of the same size with a flowing well where the conditions as to the two leases, improvements, qualities, etc., are alike; and in proving the value of the lease of the adjoining tract it was proper to prove what it could have been sold for under existing conditions.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 183.

GRANT OF RIGHT TO PROSPECT FOR OIL AND GAS.

The right to go upon land for the purpose of prospecting and taking therefrom oil and gas is a proper subject of sale and may be granted or reserved by deed or other conveyance. The title to the oil and gas becomes perfect when discovered and reduced to actual possession.

Ramey v. Stephney (Oklahoma), 173 Pacific 73.

GRANT OF OIL AND GAS—RIGHTS GRANTED.

Oil and gas while in the earth are not the subject of ownership distinct from the soil and the grant of oil and gas is a grant, not of the oil or gas that is in the ground, but of such part as the grantee may find, and such a grant passes nothing but the right to explore for the oil and gas under the terms of the contract.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 483.

OWNERSHIP OF SURFACE—PRESUMPTION AS TO OWNERSHIP OF OIL.

The owners of several tracts of land entered as "surface" for the purpose of taxation continued to own the undivided interest in the oil and gas and presumably the value of such interest was included in the valuation of the land entered as "surface;" and a general allegation that such oil and gas interests or estates were not subsequently taxed will not overcome the presumption that such undivided interest continued charged to the owners of the estates entered as surface.

State v. Guffey (West Virginia), 95 Southeastern 1048, p. 1049.

SALE—SEVERANCE OF SURFACE AND MINERALS.

When the owner of land conveys to another the oil and gas which has not been developed, the oil and gas become property distinct from the surface and are under two ownerships; the oil and gas are a real and corporeal property separate from the surface or soil itself. Oil is a part of the land and owned by the owner of the land, and the owner can sever such ownership and except or reserve the oil to himself.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 485.

CONVEYANCE OF OIL AND GAS—CONSTRUCTION OF DEED—RIGHT TO PROSPECT.

A quit claim deed by a landowner recited that it "does hereby grant, bargain, sell, convey, and quit claim" to a named grantee "all of its right, title, and interest in the oil and gas for 21 years from March 29, 1912, in and under," the described land. The deed further stipulated: "This is intended to convey only nine-tenths of the oil and gas for 21 years from March 29, 1912, which nine-tenths was reserved by the grantor in a deed by the grantor" in a certain prior deed described. The recital as to the conveyance of only nine-tenths of the oil and gas does not limit the deed to a simple conveyance of nine-tenths of the oil and gas in and under the land, but the deed conveyed to the grantee all the rights of the grantor re-

served in its warranty deed to nine-tenths of the oil and gas, including the right to enter upon the land, prospect and drill and take therefrom the oil and gas.

Ramey v. Stephney (Oklahoma), 173 Pacific 72.

CONVEYANCE—INCONSISTENT CLAUSES—CONSTRUCTION—INTENTION OF GRANTOR.

A quit claim deed by a landowner to a purchaser purported to convey all the grantor's right, title, and interest in the oil and gas in the land. A later clause in the deed recited that it intended to convey only nine-tenths of the oil and gas. The rule of construction is that a grant must be construed to effect the plain intention of the grantor and if that intention is plain it controls regardless of inconsistent clauses which are to be reconciled by the intention deduced from the entire instrument. The provision that the deed intended to convey only nine-tenths of the oil and gas is not in conflict with the granting clause nor does it defeat its effect, where the deed otherwise showed that the grantor had owned only nine-tenths of the oil and gas.

Ramey v. Stephney (Oklahoma), 173 Pacific 73.

INJUNCTION AND RECEIVER.

Drilling operations on lands withdrawn from occupation and development by presidential order may be enjoined against an oil locator who has caused to be assigned to him a large number of distinct oil locations, where the injunction against further drilling will not harm the locator and operator, and where there is nothing to indicate that he intended to continue drilling until controversies pending in the Land Office were settled.

United States v. Honolulu Consolidated Oil Co., 249 Federal 167, p. 168.

CONTRACT FOR DRILLING—CONSTRUCTION AND CONSIDERATION—"PROPOSED WELL."

A contract between a well driller and an oil company for the drilling of certain oil wells provided that a further sum of \$1,000 shall be paid to the driller "when and after a well proposed to be drilled * * * is drilled in and proves a commercial paying oil or gas well." The word "proposed" must, in the construction of the contract, be defined as a fixed intention on the part of the promisor, fully known to the promisee at the time the contract was entered into that the well was contracted to be drilled upon the land referred to in the contract.

Gem Oil Co. v. Callendar (Oklahoma), 173 Pacific 820, p. 822.

TENANTS IN COMMON—FRAUD OF ONE TENANT—LIABILITY TO OTHERS.

The owner of oil and gas lands conveyed the same to a third person and reserved a full one-sixteenth part of all the oil and gas in and under the land conveyed. The grantee covenanted to lease the land for the production of oil and to keep the same leased while the surrounding premises were leased for that purpose. In consideration of this agreement the grantee was to receive all delayed rentals. The grantee of the land leased the same for five years, the consideration being one-eighth of the oil produced and \$200 per year for each gas well. The lessee agreed to drill a well within 30 days or pay a rental of \$3.50 quarterly in advance for each three months until the well should be completed. The lease just before its expiration, and after the discovery of gas in paying quantities in the immediate vicinity, was renewed by the original grantee and extended for five years in consideration of \$75 in cash and the further payment of a like sum for each three months thereafter until a well was drilled. Wells were drilled in close proximity to the land on other lands owned by the original grantee, the lessor. The gas sand was such as to make probable drainage of the gas from the lands in controversy. The renewal of the lease on the part of the original grantee under the circumstances was a fraud upon the rights of the original grantor of the tract, and entitled him either to have the lease canceled or to ratify the agreement and recover one-third of the consideration paid to the lessor in lieu of drilling.

McMillan v. Connor (West Virginia), 95 Southeastern 642, p. 643.

INSURANCE—LOSS OF OIL—OPTION TO REPLACE.

An insurance policy covered oil and the tanks in which the oil was contained and gave the insurer, in case of loss, an option to repair, rebuild, or replace the property lost or damaged with other like kind and quality within a reasonable time. On the destruction of oil and tanks by fire the insurer can not elect to replace the oil without the tanks in lieu of paying the damages in money. If the insurer proposed to replace the oil it was bound also to replace the tanks as the insurance covered both. The option to replace is an option to replace the entire loss and it is not permissible to replace in part and pay in part. If the policy had covered the oil only the insured may have taken the chance of having at hand suitable tanks or some other container in which to receive the oil if the insurer proposed to replace the oil, but this rule will not be applied where the policy covered the tanks as well as the oil.

Globe & Rutgers v. Prairie Oil & Gas Co., 248 Federal 452, p. 457.

INSURANCE—LOSS OF OIL—DEDUCTION FOR SEDIMENT.

In an action on an insurance policy for the loss of oil stored in tanks the proof of loss stated the contents of the tanks destroyed at a certain number of barrels less a certain stated number of barrels deducted for sediment and less a certain number of barrels saved, showing the net balance of barrels of oil destroyed. The insurer can not claim a certain stated per cent deduction for sediment, amounting to more than that allowed by the insured where the per cent of deduction insisted upon by the insurer is that customary for sediment accumulated in the various tanks through which the oil passes before reaching the final storage tank and where it appears that on reaching the final storage tank having passed over a distance of from 400 to 500 miles the oil is 100 per cent pure, or at most contains about a quarter of 1 per cent of sediment. But in the absence of proof showing a different amount of sediment from that allowed in the proof of loss there was no question of fact on the particular issue.

Globe & Rutger v. Prairie Oil & Gas Co., 248 Federal 452, p. 458.

LOSS OF OIL BY FIRE—MEASURE OF DAMAGES.

An insurance policy covering oil in tanks provided that the company should not be liable beyond the actual cash value of the property at the time of loss and the loss shall be ascertained according to such actual cash value with proper deductions for depreciation. On the loss of the oil insured the actual cash value was to be the measure of damages, but it could not exceed what it would cost the insured to replace it. The cash value of an article is the amount of cash for which it will exchange in fact; and cash value is the market value for which an article will sell for in cash on the market. Where a State had a State corporation commission which fixed the price of oil and no one had a legal right to sell oil in the State for less than the price so established, this is sufficient to establish the cash value of the oil, especially in the absence of countervailing evidence.

Globe & Rutger v. Prairie Oil & Gas Co., 248 Federal 452, p. 457.

NATURAL GAS.**BOND FOR FRANCHISE FOR NATURAL GAS LINE—DAMAGES OR PENALTY.**

The fiscal court sold a franchise for a natural-gas pipe line to a public-service corporation, it being the highest bidder. The public-service corporation was required to give a bond in the sum of \$1,000, conditioned that it should within six months from the date of the

purchase of the franchise comply with the terms of the franchise and furnish gas to the consumers in a certain designated city. The sum stated was held to be liquidated damages in view of the fact that it would be practically impossible to estimate the damages which would accrue from a breach of the bond and that the sum fixed was not unreasonable or oppressive.

Fiscal Court, etc., v. Kentucky Public Service Co. (Kentucky), 204 Southwestern 77, p. 79.

RECEIVER—REGULATION OF RATES.

The courts of Kansas have no jurisdiction to appoint receivers for the purpose of regulating the rates of natural gas companies, and neither courts nor receivers of such corporations have jurisdiction to change legal rates without the consent of the public utilities commission; but when the legal rates charged by the receiver of a natural-gas company have been enjoined the receiver may put into effect rates to be charged until the public utilities commission establishes a new rate.

State v. Independence Gas Co. (Kansas), 172 Pacific 713, p. 714.

PIPE LINES.

IMPROPER CONSTRUCTION ON HIGHWAY—LIABILITY—PROOF.

A pipe line company laying its pipe line in a highway and leaving the pipe a distance of 12 inches above the ground thereby created a nuisance. The building of such a structure was not only negligent but it was a wrong, which rendered the pipe-line company liable without proof of negligence. But the fact that the court, in an action by a person injured by reason of the construction of the pipe line, in its instructions placed the burden upon the plaintiff of proving negligence did not prejudice the defendant.

Carlson v. Mid-Continent Development Co. (Kansas), 173 Pacific 910, p. 911.

LIABILITY OF OWNER DURING RECEIVERSHIP.

A gas company laid its pipe line in a highway more than 12 inches above the ground and while plaintiff was driving along the highway his horses' feet were caught under the pipe throwing the horses down, upsetting the buggy and injuring the plaintiff. At the time of the accident and injury the pipe line and the property of the pipe line company were in the hands of a receiver, but at the time the plaintiff began his action for damages against the company the property had been restored to the possession of the company. Under such circumstances the company so negligently constructing the line is liable, although the pipe line was in the control of the receiver at the time the plaintiff was injured.

Carlson v. Mid-Continent Development Co. (Kansas), 173 Pacific 910.

RAILROAD GRANTS.

LIEU LANDS—MINERAL CHARACTER.

Conditions which are such as to suggest the probability that lieu lands selected under a railroad grant contain some oil at some depth, but where there is nothing to point persuasively to its quality, extent or value or that the conditions were such as to suggest the possibility of oil in paying quantities and to induce venturesome persons to prospect the field, are not sufficient to justify the cancellation of a patent after seven years' standing, although there was a subsequent discovery of oil in paying quantities.

Southern Pacific Co. v. United States, 249 Federal 785, p. 804.

SELECTION OF NONMINERAL LANDS—KNOWLEDGE OF AGENT.

In the selection of lieu lands under the Southern Pacific Railroad grant, the railroad company was required to attach to its selection list an affidavit by its land agent to the effect that the lands listed had been examined and that they are not mineral lands. An agent making such an affidavit is chargeable with knowledge of all the conditions that a careful examination of the land would have disclosed, and a court must assume that the agent had all such valuable information, including that which was known to the company's geologist and other agents and employees.

Southern Pacific Co. v. United States, 249 Federal 785, p. 804.

MINING TERMS.

ACCIDENT.

An accident is any unlooked mishap or untoward event not expected or designed.

Indian Creek Coal & Min. Co. v. Calvert (Indiana Appeals), 119 Northeastern 519, p. 521.

ALL COAL.

The term "all coal" used in a lease is the equivalent to all minable coal.

Fisher v. Maple Block Coal Co. (Iowa), 168 Northwestern 110, p. 111.

GIANT.

A giant is the nozzle of a pipe used to convey water for hydraulic mining and is used for the purpose of distributing or properly applying and increasing the force of the water.

Roseburg National Bank v. Camp (Oregon), 173 Pacific 313, p. 316.

OIL TERRITORY.

Oil territory does not necessarily imply a real issue of fact as the phrase has no fixed or well recognized meaning and may well be used in one sense and understood in another. But it may mean territory where the observable geological conditions are such as to justify expenditures in prospecting by those who are able to take the chance.

Southern Pacific Co. v. United States, 249 Federal 785, p. 786.

PERSONAL INJURY.

A personal injury under a workmen's compensation act or an employers' liability act, has reference to the consequences or disability that results therefrom.

Indian Creek Coal & Min. Co. v. Calvert (Indiana Appeals), 119 Northeastern 519, p. 525.

SLOW DRAG.

A "slow drag" is a trip or train of cars run by a mine operator for the purpose of carrying men in and out of the mine.

Sloss-Sheffield Steel & Iron Co. v. Crosby (Alabama), 78 Southern 898.

SLUDGE.

Sludge is a murky colored sediment flowing from the operations of a lead and zinc mining plant.

Dickensheet v. Chateau Min. Co. (Missouri Appeals), 202 Southwestern 624, p. 625.

TRIP.

A "trip" is a number of mine cars attached together and drawn by a mule or other motive power.

Maize v. Big Creek Coal Co. (Missouri Appeals), 203 Southwestern 633, p. 634.

MINING CORPORATIONS.

PROMOTERS—FIDUCIARY RELATION TO CORPORATION AND STOCKHOLDERS.

Promoters of a mining corporation stand in a fiduciary relation to the corporation and to the subscribers for stock as well as to those it is expected will afterwards purchase stock from the corporation. The promoters owe to such persons the utmost good faith and if they undertake to sell their own property to the corporation they are bound to disclose the whole truth respecting it. If they fail to do this, or if they receive secret profits out of the transaction, either in cash or by way of an allotment of stock, if there are other stockholders, the corporation may elect to avoid the purchase or it may hold the promoters accountable for the secret profits or may require a return of the stock if unsold and if sold an accounting for the profits of its sale.

North American Coal & Coke Co. v. O'Neal (West Virginia), 95 Southeastern 822, p. 825.

PROMOTERS AND DIRECTORS—ACCOUNTING FOR SECRET PROFITS.

Promoters or directors of a corporation and those colluding with them who in breach of their trust and in fraud of the corporation take to themselves secret profits are liable to account to the corporation therefor.

North American Coal & Coke Co. v. O'Neal (West Virginia), 95 Southeastern 822, p. 825.

FRAUD OF PROMOTERS—LIABILITY—PARTIES.

Certain promoters of a corporation who were afterwards selected as directors, officers and agents of the corporation voluntarily surrendered to the corporation all the profits of a conspiracy entered into by them and other promoters to defraud the corporation. Subsequently a bill was filed by the corporation against the remaining promoters, parties to the fraud to clear up the title to property purchased by the corporation being the subject matter of the fraud and conspiracy and for an accounting by them for money and property fraudulently obtained, the promoters and officers who voluntarily surrendered their part of all the profits of the conspiracy are not necessary parties to the action or relief.

North American Coal & Coke Co. v. O'Neal (West Virginia), 95 Southeastern 822, p. 823.

LIABILITY OF DEFRAUDING PROMOTERS.

One of several promoters of a mining company fraudulently conspired with other promoters to make certain secret profits in the purchase of a tract of coal land for the corporation and as a part of the scheme fraudulently and secretly agreed with the other promoters to allow and pay them out of the price he was to receive from a syndicate of which he was also a member and by and through which the coal lands were to be fraudulently transferred to the corporation at a price which would net to the syndicate a great profit, may in a suit by the corporation, after receiving a conveyance of the land be held to account to it for the sum so paid or agreed to be paid by him to other promoters in addition to the amount received by such promoter in carrying out the fraudulent scheme.

North American Coal & Coke Co. v. O'Neal (West Virginia), 95 Southeastern 822, p. 824.

CAPITAL STOCK—PAYMENT IN PROPERTY.

When a statute or a charter authorizes the capital stock of a corporation to be paid in property, and the stockholders honestly and in good faith put in property instead of money in payment of their subscriptions, third persons have no grounds for complaint. Under this rule the owners of an oil lease may form a corporation and transfer to it as its capital stock the lease, at a fair and reasonable value, in good faith estimated by the owners—the stockholders and subsequent creditors of the corporation can not attack the validity of the incorporation except for fraud in overvaluation of the property.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 184.

PROPERTY RECEIVED IN PAYMENT OF CAPITAL STOCK—PROOF OF VALUE.

The statute of Texas provides that when the stockholders of a corporation shall furnish satisfactory evidence to the Secretary of State that the full amount of the capital stock has been subscribed and 50 per cent paid in cash or its equivalent in property or labor done, the product of which shall be to the company the actual value at which it was taken or property received, that officer shall, on the payment of the fee and tax, issue a certificate of incorporation. Under this statute, owners of an oil lease may form themselves into a corporation and capitalize the corporation on the value of their lease; and it is sufficient if the incorporators on their oaths state the cash value of the property received, giving its description and location; and when the Secretary of State accepts the value placed upon the property and issues the charter, the valuation of the property is

prima facie correct and can only be called in question on the ground of fraud.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 187.

OIL LEASE AS BASIS OF CAPITAL—PROOF OF VALUE OF STOCK.

The joint owners of an oil lease on a ten-acre tract of land with an oil well that had been flowing for two months, organized a corporation, valued the lease at \$120,000, and issued stock to the owners and subscribers for their respective interest in the lease. In an action by creditors of a corporation to hold the stockholders personally liable for debts it was proper for a stockholder to testify how he and his associates arrived at the value they placed on the lease, and that one method was to show the revenue it was then producing. Proof that other and older wells on adjoining tracts were still producing apparently the same amount of oil as when first brought in, and the owners of the well in controversy had the right to presume that their well would continue to flow oil together with other wells to be sunk on the land and to value it accordingly. They had the right to show that the well was producing from 2,000 to 2,500 barrels per day, and that they were receiving 45 cents per barrel for the oil, and that on such basis they could safely place the valuation at \$120,000.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 185.

PROPERTY AS BASIS OF CAPITAL—LIABILITY OF STOCKHOLDERS.

Where a statute or the charter of a corporation authorizes the payment of capital stock in property, the incorporators are not responsible for an honest error in judgment or a mistake in placing valuation on property appropriated or used as capital by a mining company; and where it appears that the persons forming the corporation honestly believed the property to be worth the amount specified in the articles and that their mistake was one of judgment only, their action can not be considered fraudulent either in fact or in law. The law imposes no penalty of this kind upon the stockholders or trustees of a company for a mistake or erroneous judgment in the honest and faithful discharge of their duties.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 187.

SALE OF TREASURY STOCK—OPTION PURCHASE—SPECIFIC PERFORMANCE.

Treasury stock of a mining corporation was sold at 10 cents per share to be taken and paid for in such sums and amounts as might be required in the prosecution of development work. The purchaser

was given the right to "throw up" the option on reasonable notice, and the stock was to be issued as each payment was made at the specified rate per share. This was not a contract for an outright unconditional sale of stock, but it was a conditional sale to be consummated in part or in whole as the need for raising funds for the prosecution of the development of the mine might arise; neither was it an option open to acceptance for an unlimited time. It was not intended that the contract should have any binding force upon either the mining company or the purchaser after the mine became a profitable working mine and the need for the money for development work had ceased. After such a condition arose and money for development work was no longer needed the mining corporation could not insist upon specific performance of the contract.

Woldson v. Richmond Min., Smelting, etc., Co. (Washington), 172 Pacific 1162.

INCREASE OF CAPITAL STOCK—RIGHT OF STOCKHOLDERS TO PURCHASE.

When the capital stock of a mining corporation is increased by the issue of new stock, each holder of the original stock has a right to subscribe for and to demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase. The rule applies to such part of the capital stock as is issued after the corporation has commenced business.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 819.

RIGHT TO SELL UNISSUED STOCK.

A private corporation issued and sold part only of its authorized capital stock and engaged in business for some time and desired to increase its working capital. It was then within the discretion of the directors of the corporation to determine the manner in which the money should be raised and they may lawfully do so by selling a part or all of its unissued stock and they may sell it at such price per share as previously determined by a majority vote of the stockholders.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 819.

PURCHASE OF STOCK—SPECIFIC PERFORMANCE—RIGHTS OF PURCHASER.

Ordinarily complete and satisfactory remedy for a failure to deliver certificates of stock to a purchaser may be had in damages at law but there are exceptions where the value of the stock is not readily to be ascertained or where the stock can not be had in the market except at great inconvenience and expense.

Mutual Oil Co. v. Hills, 248 Federal 257, p. 260.

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF STOCK.

Where the stock of a corporation has a recognized market value, courts will ordinarily leave a purchaser to his action at law for damages for breach of an agreement to sell; but where the stock of a mining corporation has no recognized market value, is not purchasable in the market, or has a value which is not settled but is contingent upon the further workings of the corporation, equity may decree specific performance of a contract to sell the stock of the corporation.

Mutual Oil Co. v. Hills, 248 Federal 257, p. 260.

AGREEMENT TO EMPLOY OFFICER—SALE OF STOCK—SPECIFIC PERFORMANCE.

An oil company entered into an agreement with the president of a competing company by which he was to end his relation with the competitor and to take charge of the business of the oil company as district manager. As a necessary part of that agreement he entered into an agreement to purchase a certain number of the shares of the stock of the oil company at an agreed price to be paid for in a certain stated manner. Pursuant to the agreement the party severed his connection with the competing oil company, became manager of the oil company in one of its districts and continued in that relation for three years, when he was discharged. In an action by such manager for specific performance to compel the transfer of the shares of stock purchased it appeared that the value of the stock had risen from the face value to \$200 per share; that the business of the company had and continued to increase; that large dividends would be earned; that there was but a limited amount of stock issued and that no stock was for sale upon the market; that it was impossible to determine the actual damage the complainant would sustain if the stock was not delivered to him and that the oil company had sufficient stock to transfer the number of shares agreed upon. Under such a state of facts a court if equity is authorized to decree specific performance of the agreement and compel the issue of the stock.

Mutual Oil Co. v. Hills, 248 Federal 257, p. 260.

PRINCIPAL PLACE OF BUSINESS—MEANING.

The Western Oil Refining Company, a corporation organized in the State of Indiana, owned two stationary oil tanks located at Glasgow, Ky., on which it paid an ad valorem tax; that it had selling agents in Glasgow who used the tanks as storage places for oil and from which they sold many thousands of gallons of oil annually by the use of oil wagons owned by the corporation and for which it procured a

license to operate; that frequently the oil was shipped from the home office in Indiana billed to itself at Glasgow and on arrival there was received by its selling agents and put into the tanks from which it subsequently distributed the oil to the customers. These facts are sufficient to show that the company was doing business in the State and had one of its principal places of business in the State within the meaning of the Kentucky statute requiring it to paint or print its corporate name in a conspicuous place upon its premises.

Western Oil Refining Co. v. Commonwealth (Kentucky), 202 Southwestern 636, p. 637.

DUTY TO PUBLISH CORPORATE NAME.

The statute of Kentucky requires every corporation doing business in the State to have painted or printed the corporate name in a conspicuous place and in letters sufficiently large to be easily read and in like manner to have printed or painted the word "incorporated." The fact that a mining corporation engaged in selling oil had the word "incorporated" painted or printed as required by the statute constitutes only a partial compliance with the statute and is not sufficient to exonerate the corporation from the penalty imposed by the statute, but the corporation must go further and paint or print its corporate name as well as the word "incorporated."

Western Oil Refining Co. v. Commonwealth (Kentucky), 202 Southwestern 636, p. 637.

LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.

Creditors of an oil corporation sought by an action to hold the subscribers to the capital stock liable for the corporate debts on the insolvency of the corporation, on the ground that the capital stock had been paid in property at a fictitious price and an overvaluation. A recovery was not permitted under the statute of Texas where the proof showed that an oil lease on a ten acre tract of land was received by the incorporators, the owners of the lease, at an estimated value of \$120,000; that there was at the time of the incorporation on the tract a flowing well producing from 2,000 to 2,500 barrels of oil per day; that they were receiving a revenue of from \$1,000 to \$1,200 per day; that other wells on adjoining tracts, similar in conditions and surroundings, had shown an equal or greater and an undiminished production for a period of two months and more; that offers of \$200,000 had been made for similar leases in the same field; that undeveloped tracts had sold for \$8,000 per acre, and that experienced oil operators had placed a value of \$200,000 on the particular lease.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 184.

FAILURE TO PUBLISH CORPORATE NAME—DOING BUSINESS.

An indictment against a mining corporation under the Kentucky statute for failing to post in a conspicuous place its corporate name and the fact that it was incorporated is sufficient where it charges that an oil company had one of its principal places of business at a certain named city in the state and was "then and there engaged in the business of selling oil," as this is sufficient to show that the company was engaged in "doing business" in the state named.

Western Oil Refining Co. v. Commonwealth (Kentucky), 202 Southwestern 636, p. 637.

DISCRETION OF DIRECTORS—CONTROL OF COURTS.

Courts of equity will not interfere by injunction as a general rule to control the discretion of the directors of a private corporation in the management of its internal affairs.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 819.

DIRECTOR INTERESTED—RIGHT TO VOTE.

The reason for denying to a director of a corporation the right to vote on a matter in which he is otherwise interested than as a stockholder in the corporation is because of the fiduciary trust relation he bears toward it.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 817.

CONTRACT—INTEREST OF DIRECTOR—RATIFICATION BY STOCKHOLDERS.

A contract made by the directors of a corporation is not affected by the fact that one or more of the directors had an interest in such contract other than as stockholders in the corporation where the contract was either authorized or was subsequently ratified by a majority vote of the stockholders in a meeting regularly assembled.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 818.

STOCKHOLDERS INTERESTED—RESTRICTION ON RIGHT TO VOTE.

The only restriction upon the right of a stockholder to vote in a stockholders' meeting where he is personally interested seems to be that the matter must not be illegal or ultra vires and the action of the majority of the stockholders must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the interest of the corporation and destructive of the interest of the minority stockholders.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 818.

STOCKHOLDER INTERESTED—RIGHT TO VOTE.

A stockholder in a corporation is not denied his right to vote on any matter properly coming before a stockholders' meeting on account of any private interest he may have which is detrimental to the corporation.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 817.

CONTRACT BETWEEN STOCKHOLDERS—EFFECT ON CORPORATION.

A contract between certain stockholders of a mining corporation to which the mining corporation was not a party, can have no binding effect on the corporation, and no action against the corporation can be based on such contract.

Northrop-Bell Oil & Gas Co., In re (Oklahoma), 171 Pacific 1116.

ACTION AGAINST—SERVICE ON OFFICER—SUFFICIENCY OF RETURN.

Under the laws of Oklahoma service can be made upon the corporation's treasurer only when the president, chairman of the board of directors, or other chief officers can not be found in the jurisdiction, and this fact must be stated in the officer's return of service. Where a return shows service on the treasurer of a corporation, but fails to show the absence of other officers of the corporation, the court may direct the officer serving the writ to amend his returns according to the true state of facts.

Stevirmac Oil & Gas Co. v. Dittman, 38 Supreme Court Rep. 116.

POWER TO EXECUTE INDEMNITY CONTRACT.

A mining company as lessee of a mine may execute a valid contract of indemnity by which it agrees to indemnify and save harmless the lessor of certain mining machinery by reason of injuries to employees, although any such injuries might be caused by the negligence of the lessor.

Harden v. Southern Surety Co. (Missouri Appeals), 204 Southwestern 34, p. 35.

CORPORATION SELLING PRODUCTS OF MINES—RESTRAINT OF TRADE.

A contract of agency by which a corporation undertakes to sell the coal produced by several mining companies is not void as being in restraint of trade where the selling corporation is not owned or controlled by the mining companies and where it sells the coal as its own property.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 818.

SUPERINTENDENT OF MINE—AGENT—AUTHORITY.

A corporation acts only by and through its officers and agents. The general manager of a coal mining company has authority to bind it by such contracts as are reasonably incident to the management of the business. In an action to recover damages for the breach of a contract for the sale of the output of a mining company's coal mine, it is not incumbent upon the plaintiff to prove that the general manager of the coal company was expressly authorized to make the contract sued on in order to hold the mining company liable. His apparent authority as general manager of the business of the coal company to make the contract was sufficient ground to create a liability.

Producers' Coal Co. v. Mifflin Coal Min. Co. (West Virginia), 95 Southeastern 948, p. 950.

ENFORCING LIEN AGAINST STOCK—JUDGMENT BINDING ON COOWNERS.

In an action to enforce a lien against stock of a mining corporation owned jointly by several parties a judgment enforcing the lien is binding upon all the parties, though some of them were not within the jurisdiction of the court, and were not served with process, but had actual knowledge of the pendency of the suit.

Montana Coal & Oil Co. v. Haskins (Oregon), 172 Pacific 119, p. 120.

TRUST FUNDS FOR INJURED MINERS—MINING CORPORATION AS TRUSTEE.

In the mining regions of Michigan it was the custom for the miners to pay, or for a mining corporation to retain from the pay of every miner, a small sum per month, to be used as a fund to be paid to injured miners. In such cases the fund so accumulated was a trust fund and the mining corporation a trustee.

Walters v. Pittsburgh, etc. Iron Co. (Michigan), 167 Northwestern 834, p. 836.

EMPLOYEE'S BENEFIT FUND—TERMINATION OF PURPOSE—OWNER OF SURPLUS.

A mining corporation received monthly from its miners certain sums and itself contributed an equal sum by which a fund was created to be paid to injured miners. The practice was maintained for many years and a large trust fund accumulated, as an aggregate of the overpayments made by the miners. The fund was deposited with and held by the corporation upon the express trust to disburse so much thereof as was necessary from time to time in the payment of injury or death benefits. When the mining company accepted

the Michigan workmen's compensation law the purposes of the trust were discharged and the trust extinguished, and thereupon in the absence of an agreement a resulting trust arose in favor of all who had at any time contributed to the fund. If a trust for a specific purpose fails by the failure of the purpose the property reverts to the donor.

Walters v. Pittsburgh, etc. Iron Co. (Michigan), 167 Northwestern 834, p. 836.

CONTRIBUTIONS TO MINERS' RELIEF FUND—DISTRIBUTION OF SURPLUS.

The employees and miners of a mining company contributed monthly from their wages a fund for the payment of benefits to injured miners, the company paying sums equal to those paid by the miners. The payments were continued over a long period of time and many contributing miners terminated their employment and stopped their contributions, while other miners were during the period employed and made like contributions. A large surplus fund had accumulated at the time of the enactment of the Michigan workmen's compensation act and the contributions ceased on the acceptance by the mining corporation of that act. The surplus remaining in the possession of the corporation was a trust fund and must be distributed to all contributors in proportion to the amount contributed by each. The difficulty of locating some of the contributors does not affect this equitable rule of distribution. The rule that remaining members of a voluntary association on its dissolution own the funds does not apply to the facts as they appear in this case.

Walters v. Pittsburgh, etc. Iron Co. (Michigan), 167 Northwestern 834, p. 837.

DISSOLUTION—LAW GOVERNING.

A mining company organized under the laws of Nevada carrying on its mining operations in Alaska is governed as to the time and manner of its dissolution by the statute of Nevada.

Matson v. Connecott Min. Co. (Washington), 171 Pacific 1040, p. 1044.

DISSOLUTION—EXISTENCE CONTINUED.

A mining company organized under the laws of Nevada, doing business in the State of Washington, was sued in the latter State for damages for injuries to an employee on the ground of its alleged negligence. The complaint was signed and verified on June 1, 1915, but the corporation was properly dissolved June 10, 1915, before service or an appearance by it to the action. The statute of Nevada (Laws 1903, chap. 88) provides that corporations shall be continued for one year from the expiration of the charter or dissolution, and until all

litigation to which the corporation is a party, if begun within the year, is ended. The statute of Nevada in effect continued the corporation's existence for the purpose of commencing actions against it, and the corporation had a legal existence as a corporate entity for the purpose of the action in Washington at the time of its commencement; and where the action had been commenced within one year following the disincorporation of a company for other purposes, the action could proceed to final judgment upon the merits in favor of or against the corporate entity.

Matson v. Connecott Min. Co. (Washington), 171 Pacific 1040, p. 1042.

FORFEITURE OF CHARTER—POWER TO CONFESS JUDGMENT.

Under the statutes of Utah (Laws 1909, p. 228; Laws 1913, p. 14), on the forfeiture of the charter of a corporation, or where its franchise has expired by limitation, the corporation may continue for the purpose of winding up its affairs, and for this purpose may sell or otherwise dispose of its property, may make contracts, and sue and be sued. These statutes contemplate that the board of directors of a mining company shall wind up its affairs on the forfeiture of its charter; and under this authority the board of directors may confess a judgment on an indebtedness justly owing by the corporation and which it was unable to pay.

Henriod v. East Tintic Development Co. (Utah), 173 Pacific 134, p. 136.

MINING PARTNERSHIPS.

WHAT CONSTITUTES.

Mining partnerships are indulged between coowners only when they actually engage in working the mining property. Before actual operations began and after actual operations cease the parties are simply cotenants unless the ordinary partnership has in fact been formed.

Huston v. Cox (Kansas), 172 Pacific 992, p. 993.

FORMATION—CONTRIBUTION BY PARTNERS.

A mere agreement to form a partnership does not itself create a partnership, nor does the advancement by any one partner of his agreed share of the capital; but the entire agreement and all the attending circumstances must be taken into consideration in determining whether a partnership was actually formed. The fact that two or three persons proposing to form a partnership may have paid their proportions of the capital provided for would not establish a partnership composed of the three persons named, with each contributing property of considerable value, when there is no proof that the third party either directly or through one of the others paid his part of the capital.

Costello v. Gleason (Arizona), 172 Pacific 730, p. 734.

CONTRACTS—REFORMATION OF INSTRUMENT.

A mining contract or lease executed in the names of the individual members of the firm may be reformed and enforced in the name of the firm where the contractee knew that he was dealing with the firm as such.

Last Chance Min. Co. v. Tuckahoe Min. Co. (Missouri Appeals), 202 Southwestern 287.

CONVEYANCE OF LAND TO FIRM—RIGHTS OF PARTNERS.

A conveyance of mineral lands to a firm in its firm name vests the title to the land in the partners as tenants in common; and in the absence of partnership debts the partners have a right to personally divide the lands between them as real estate.

Kentucky Block Cannel Coal Co. v. Sewell, 249 Federal 840, p. 843.

TRUST RELATION—PROOF.

A consummated partnership which would have the effect of establishing in one partner a trust relation regarding certain mining claims should be proved by evidence as clear and satisfactory as would be required to show a trust relation direct without the intervention of a partnership.

Costello v. Gleason (Arizona), 172 Pacific 730, p. 734.

FIDUCIARY RELATION—BREACH OF DUTY.

The requirement of the utmost good faith forbids that a partner benefit his private interest by deceiving his copartner by misrepresentations or concealments of the confidential relation. A mining partner who promised, on a sufficient consideration, to perform the assessment work on a mining claim owned by the partners can not be permitted, after failing to perform the assessment work, to procure the ground to be relocated and the new location conveyed to him, thereby depriving the other partner of his interest in the claim.

Kittilsby v. Vevelstadt (Washington), 173 Pacific 744, p. 745.

FRAUD OF PARTNER—PROCURING RELOCATION—LIABILITY.

One of two partners, owners of a mining claim, agreed to have the assessment work done for a certain year. He failed to perform or to have performed the assessment work, but secretly requested a third person to make a relocation and to locate a claim covering practically the same ground. This partner, in conjunction with another third person, located three other claims adjoining such relocated claim. Subsequently all the claims were sold, the partner received \$10,000 as his share for all the claims. The original partner, on discovering the failure of the partner to perform the assessment work as agreed and the relocation of the ground and the sale of the claims, brought suit for relief and was awarded the sum of \$5,000, one-half of the entire amount received by the defrauding partner for all the claims.

Kittilsby v. Vevelstadt (Washington), 173 Pacific 744, p. 745.

RIGHT TO APPOINT RECEIVER.

Whether the parties owning an oil and gas lease and intending to operate the same are partners or whether they are simply cotenants of an incorporeal hereditament, is no reason why a court of equity should not appoint a receiver to hold the lease, protect the property, and perform other functions where the parties can not agree with respect to their rights, or as to the management of the property or a disposition of it.

Huston v. Cox (Kansas), 172 Pacific 992, p. 993.

ABADONMENT AND DISSOLUTION.

One partner in a mining partnership enterprise accepted the proceeds of certain notes which had been the foundation upon which his interest in the partnership rested and made no arrangements for paying his proportion of the partnership capital and furnished no security therefor. These acts conclusively show an abandonment by him of his interest in the partnership property regardless of his intention. A partner can not withdraw his entire contribution because of the fear of losing both his interest and his money and afterward recover in an equity action the very interest which the money withdrawn was supposed to pay for.

Costello v. Gleason (Arizona), 172 Pacific 730, p. 738.

PRINCIPAL AND AGENT.

DUTY OF AGENT—BREACH OF CONFIDENTIAL RELATIONS.

An agent is held to the utmost good faith in his dealing with his principal. If he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his employer's conduct in dealing with the subject of employment, it is such a fraud upon his employer as forfeits any right to compensation for his services. This rule was applied in an action by a mining engineer to recover from a third person a part of the compensation paid such third person by a mining and exploration company for services in the purchase of certain mining claims during a time when the mining engineer was an agent of the mining and exploration company under an agreement to devote his entire time to the mining company and not to become interested in or connected in any way with any business similar to that which the mining company carried on.

Beatty v. Guggenheim Exploration Co. (New York), 119 Northeastern 575, p. 576.

GENERAL MANAGER OF COAL COMPANY—AUTHORITY AS AGENT.

The general manager of a coal mining corporation is a general agent and has implied authority to bind the company by such contracts and modifications thereof as are reasonably necessary in conducting the business of mining and selling coal. Where such an agent has such implied power to bind his principal it is error to submit to a jury the question of his authority.

Producers' Coal Co. v. Mifflin Coal Min. Co. (West Virginia), 95 Southeastern 948, p. 950.

PROOF OF AGENCY—MINE FOREMAN ACTING AS AGENT.

The mere fact that a mine foreman assumed to act as the agent of the mine operator is not alone sufficient to show such agency. To establish such agency without proof of express authority by the acts of the mine foreman alone, those acts must have been so open, apparent and notorious that it is evident that they must have been known to the mine operator.

Strother v. United States Coal & Coke Co. (West Virginia), 95 Southeastern 806, p. 807.

GENERAL MANAGER OF COAL MINING COMPANY—AUTHORITY—PROOF.

In an action against a coal mining company for damages for the breach of a contract executed by the general manager of the coal company providing for the sale of the entire output of its mines, the contractee, as plaintiff, is not required to prove the authority of the general manager to make the contract in order to hold the coal company liable, as his apparent authority as general manager of the coal company's business to make the contract is sufficient ground to create a liability.

Producers' Coal Co. v. Mifflin Coal Min. Co. (West Virginia), 95 Southeastern 948, p. 950.

DUTY OF AGENT—DISOBEDIENCE—DISCHARGE.

An agent owes to his principal disinterested and unswerving loyalty and the law does not permit him to place himself secretly in a position in which his own interest is antagonistic to that of his principal, or whereby he may be tempted by self-interest to disregard the interest of his principal. This carries with it the duty of one accepting employment to disclose to his employer, if not already known to him, any and all adverse interests.

Burch v. Conklin (Missouri Appeals), 204 Southwestern 47, p. 49.

See Consumers' Lignite Co. v. James (Texas Civil Appeals), 204 Southwestern 719.

EMPLOYMENT OF SUPERINTENDENT—DISCHARGE—LIABILITY.

A mine owner, by written agreement, dated June 1, 1916, employed a superintendent for a year at a salary of \$3,600 to superintend four or five mines owned and operated by him. The employee resigned his position as deputy State mine inspector and accepted the employment and was, on September 1, 1916, discharged by the employer. In an action for damages for the wrongful discharge, an answer to the effect that the plaintiff advised the defendant in regard to the purchase of a certain mine and gave incorrect information because he was trying to induce the defendant to purchase the mine in order that he, the plaintiff, might earn a commission from the vendor, will not be sustained by proof that prior to the employment the plaintiff had induced the defendant to purchase mines and mining property and out of which purchases the plaintiff had received commissions.

Burch v. Conklin (Missouri Appeals), 204 Southwestern 47, p. 49.

VIOLATION OF CONTRACT BY AGENT.

A mining engineer by a written agreement became the agent for a specified time at a stipulated salary of the Guggenheim Exploration Company. The agreement gave the company the sole benefit of the

engineer's unbiased judgment and bound him not to become interested in or connected in any way with any business similar to that which the company carried on without the written consent of the company. It was a breach of this contract for the mining engineer as such agent to enter into a contract with a third person by which the mining engineer was to have a share in certain compensation which such third person was to receive from the sale of mining property to the mining and exploration company. The agreement of the agent with such third person was a violation of the agent's contract with the mining and exploration company and a breach of his confidential relation to that company.

Beatty v. Guggenheim Exploration Co. (New York), 119 Northeastern 575, p. 576.

RESTRAINT OF TRADE—CONTRACT OF AGENCY FOR SELLING OUTPUT OF MINE.

A contract of agency by which a coal selling corporation is to act as the sole agent in selling all the coal produced by a number of coal mining companies is not void as being in restraint of trade, where the selling corporation was not owned or controlled by the mining companies and sold the output of the mines of each company as its own individual product and at such prices as it would command in the markets.

Thurmond v. Paragon Collieries Co. (West Virginia), 95 Southeastern 816, p. 818.

LAND DEPARTMENT.

MINING ENTRY—CONTINUING AUTHORITY.

The Land Department has authority at any time before a patent is issued to inquire whether an original mineral entry was in conformity with the act of Congress.

Kirk v. Olson, 38 Supreme Court Rep. 114, p. 115.

AUTHORITY TO DETERMINE CHARACTER OF LAND.

The Land Department on an application for mineral entry and patent is authorized to inquire into the mineral character of the land described in the application. Where on a preliminary hearing the officers of the Land Department determine that the land is mineral in character and permits a mineral claimant to make entry accordingly, the finding is not conclusive, but the department may make further investigation and if the land is found to be nonmineral in character may so classify the same and cancel the entry.

Kirk v. Olson, 38 Supreme Court Rep. 114, p. 115.

MINERAL CHARACTER—DETERMINATION—JURISDICTION OF LAND OFFICE AND COURTS.

The Land Department has jurisdiction to determine the mineral or the nonmineral character of ground located as a mining claim and held as such by the performance of the annual assessment work, although the locator has made no application for patent. Where the officers of the Land Department have undertaken to inquire into the mineral character of such a mining claim a court of equity will not entertain a bill to enjoin the officers of that department from making such inquiry.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 410.

MINERAL CHARACTER—JURISDICTION TO DETERMINE—CONCLUSIVENESS OF FINDING.

The question on application for patent whether the land described was valuable for placer mining was one of fact to be determined by the officers of the Land Department, but a finding respecting the mineral character of the ground is not in itself final or conclusive, but essentially interlocutory. It was only a step in a proceeding looking to the ultimate disposal of the title and until the issue of a patent was open to reconsideration and reversal.

Kirk v. Olson, 38 Supreme Court Rep. 114, p. 115.

PUBLIC LANDS.

CLASSIFICATION—CONCLUSIVENESS OF DETERMINATION OF LAND DEPARTMENT.

Where Congress has provided for the disposition of a portion of the public lands of a particular character and authorized the officers of the Land Department to issue a patent upon the ascertainment of certain facts that the department had jurisdiction to inquire into and determine as to the existence of such fact, its determination is conclusive as against a collateral attack. Cases arise before the Land Department in the disposition of the public lands where it is difficult on the part of its officers to ascertain with accuracy whether the lands to be disposed of are mineral in character or are agricultural lands. The rule is that they will be considered mineral or agricultural as they are more valuable in the one class or the other. But the determination of the fact by the officers of the Land Department that they are one or the other will be conclusive.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 409.

MINING CLAIMS.

NATURE AND GENERAL FEATURES.

MINING CLAIM 'AS PROPERTY.

A valid mining claim is property which may be bought and sold and which passes by descent.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 409.

OWNERSHIP OF MINERALS.

The minerals in a mining claim, or that have been wrongfully taken from a mining claim, belong to the person who made the proper location of the claim and followed the same by the performance of the required annual assessment work; and the person in possession of such a claim on the public lands may sue another for the wrongful taking or conversion of minerals from his claim.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 70.

MINERAL CHARACTER OF LAND.

CHARACTER OF LAND—DETERMINATION—JURISDICTION OF LAND DEPARTMENT.

When the question of the mineral character of the land in a mining claim is an issue it is one for the Land Department.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 409.

SUFFICIENCY OF PROOF.

The finding of minerals within the surface lines of a location to the extent that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success in developing a valuable mine is sufficient to meet the requirements of the statute.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 102.

KNOWLEDGE AND BELIEF OF MINERAL CHARACTER.

The requirement of knowledge of the mineral character of land as required by the statute is not satisfied by knowledge of conditions which are plainly such to engender the belief that the land is valuable

for its minerals but to be mineral in fact the land must contain mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

Southern Pacific Co. v. United States, 249 Federal 785, p. 798.

LAND VALUABLE FOR PLACER MINING.

Placer mining claims are sufficiently established where a miner in good faith located the claims on unoccupied public lands and had been in possession of one claim for almost six years and of the other for nearly four years and the annual assessment work had been done by him on both claims and gold had been found in both.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 102.

LOCATION OF CLAIMS.

METHOD OF MAKING.

A mineral claimant merely stakes out his location, files a notice of his location in the office of the clerk of the county wherein the land is situated and proves each year that he has done a certain amount of work on the claim. By the filing of the notice of his claim he acquires what is known as a mining location, and is not required to file any papers in the Land Office unless and until he applies for patent.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 408.

POSSESSORY RIGHTS—VALIDITY OF LOCATION.

The legal right to possession of a mining claim can only come from a valid location.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 100.

VALIDITY OF SECOND LOCATION.

Where there has been a valid location of a mining claim followed by the performance of the annual assessment work by the original locator or by his assigns or a purchaser from him, there can not be another location of any part of the ground originally located, and possession under such second void location confers no rights upon the person making the same.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 70.

LOCATION NOTICE.

POSTING AT POINT OF DISCOVERY—SUFFICIENT COMPLIANCE.

In an action to quiet title to a mining claim it is a sufficient compliance with the California statute which requires the posting of a

notice at the point of discovery, where the locator testified that he put the notice "on the lode and surrounded it by a monument of rock right where the quartz shows—where the lode shows."

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 100.

POSTING AT POINT OF DISCOVERY—INSUFFICIENT COMPLIANCE.

The Code of California (Civil Code, sec. 1426) requires that the location notice of a mining claim shall be posted at the point of discovery. A posting of such a notice within 75 feet of the point of discovery is not a sufficient compliance with the statute and does not constitute a valid location.

Batt v. Steadman (California Appeals), 173 Pacific 99.

DISCOVERY.

CONDITIONS SUGGESTING PROBABILITY.

Conditions such as only suggest the probability that lands contain some oil at some depth, but without anything to point persuasively to its quality, extent, or value, can not be a discovery within the meaning of the statute.

Southern Pacific Co. v. United States, 249 Federal 785, p. 804.

RECITALS IN LOCATION NOTICE—PRESUMPTION.

Proof that the locator and his successors in interest have been in the possession of a mining claim and have held and worked the claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state where the same may be situated is sufficient to establish a right to a patent, without proof of an actual discovery where the recorded notice of location expressly recites the fact of a discovery as such a recital "creates a presumption of discovery of mineral and of a valid location."

Ralph v. Cole, 249 Federal 81, p. 93.

MARKING BOUNDARIES.

SUFFICIENCY—IDENTIFICATION OF CLAIM.

The marking of the boundaries of a mining claim on the ground, though not exactly what and where they should be, will answer the statute, if they are sufficient when taken in connection with an amended location certificate, to identify the land claimed with reasonable certainty.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 101.

SURFACE LINES.**SIDE LINES—FORM AND DIRECTION.**

The side lines of a mining location are not required to be either parallel or straight. They may have angles and elbows and be converging and diverging so long as their general course is along the vein and the statutory restriction on the width of the claim is respected.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 575.

END LINES—WHAT CONSTITUTES—PARALLELISM.

The end lines of a mining location in the sense of the statute are those which are laid across the vein to show how much of it in point of length is appropriated and claimed by the locator. The end lines of a mining location must be both parallel and straight.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 575.

SURVEY—CHANGE OF LINES.

Proceedings of miners in the location of mining claims are regarded with indulgence and lines are not required to be laid with severe accuracy. A claim is not rendered invalid because the surveyor, on the final survey, was required to draw in some of the lines as they were marked on the ground in order to bring the boundaries of the claim within the limits prescribed by law. It is a rule that for the purpose of obtaining parallelism or casting off excess the surface lines may be drawn in.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 101.

VEIN OR LODE.**OWNERSHIP OF VEINS.**

Every vein whose apex is within the vertical limits of the surface lines of a location passes to the locator by virtue of his location. He is not limited to those veins only which extend from one end line to another or from one side line to another or from one line of any kind to another but he is entitled to every vein whose top or apex lies within his surface lines and he is entitled to such veins throughout their entire depth although they may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of his location.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 575.

FISSURE VEIN—DESCRIPTION AND APEX.

A fissure vein was shown to have two dipping limbs whose course downward was substantial, regular, and practically free from undulation. For 750 feet out of its total length of 1,150 feet within a mining claim each limb was practically separate with a distinct summit or terminal edge. For the remaining 400 feet of the claim the two limbs were shown to be united and from the point of union the mineralized quartz or rock continued upward for from 20 or 30 to more than 100 feet. This is sufficient to answer all the calls of a summit or terminal edge. Under these circumstances a court would not be warranted in saying as a matter of law that the vein has no top or apex within the claim in the sense of the statute.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 577.

APEX OF VEIN.**LOCATION ON APEX—TITLE.**

The law assumes that a lode has a top or apex and provides for the acquisition of title by a location upon this apex. A court should not adjudge the absence of a top or apex in the case of a fissure vein where it appears that each limb is practically a separate vein with a distinct summit or terminal edge or where the two limbs unite and from the point of union the mineralized quartz or rock continues upward for from 20 to more than 100 feet.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 577.

EXTRALATERAL RIGHTS.**ORIGIN—WHAT CONSTITUTES.**

What in mining cases is termed the extralateral right is the creation of the mining laws of Congress and to determine what it is these laws must be looked to, rather than to some system of law to which it is a stranger. Congress having plenary power over the disposal of the mineral bearing public lands, could say to what extent, if any, the right to pursue a vein on its downward course into the earth should pass to and be reserved for those to whom it granted possessory or other titles in such lands.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 575.

RIGHT TO PURSUE VEIN BEYOND SIDE LINES.

The locator of a mining claim by section 2322, (United States Revised Statutes), is given a right to pursue any vein, whose apex is within his surface lines, on its dip outside the vertical side lines, but

he may not in such pursuit go beyond the vertical end lines of his location.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 576.

LIMITATIONS ON RIGHT.

The extralateral right created by section 2322 (United States Revised Statutes 1878) is subject to three limitations. One conditions it on the presence of the top or apex inside the boundaries of the surface location. Another restricts it to the dip or course downward and so excludes the strike or onward course along the top or apex of the vein; and the third confines it to such outside parts as lie between the end lines extended outwardly in their own direction and extended vertically downward. Otherwise the right is without limitation or exception and broadly includes "all veins, lodes and ledges throughout their entire depth"—one as much as another and all whether they depart through one side line or the other.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 575.

VEIN PASSING THROUGH BOTH SIDE LINES.

Where a single vein having its apex within the surface lines of a location in its descent separates into two limbs which depart through the opposite side lines, the owner of such surface location is entitled to follow each limb of the vein beyond the vertical side lines of his location under the statute creating extralateral rights.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 575, p. 575.

DIRECTION OF DEPARTING VEIN.

When the other elements of the extralateral right are present it may be exercised by the locator beyond either or both side lines, depending on the direction which the departing vein or veins take in their downward course.

Jim Butler Tonopah Min. Co. v. West End Consol. Min. Co., 38 Supreme Court Rep. 574, p. 576.

ASSESSMENT WORK.

PRIMA FACIE PROOF OF PERFORMANCE.

Section 2324 (United States Revised Statutes) provides that on the failure of a coowner to perform his share of the assessment work his interest on proper notice may be forfeited. The statute of California (Civil Code, sec. 14260) provides that the notice to the co-owner of his failure to perform his part of the assessment work may

be recorded within 90 days in the office of the recorder of the proper county and that such notice shall be prima facie evidence of the co-owner's delinquency. On the failure to file the notice in the recorder's office, or on failure to file it within the time required the interest of the delinquent coowner may be forfeited on actual proof of his failure to contribute to the assessment work. The filing of the notice makes it prima facie evidence only and the failure to file deprives the co-owner performing the assessment work of the prima facie effect of the filing.

Robinson v. Griest (California), 173 Pacific 88, p. 89.

PROOF IMMATERIAL IN SUIT ON ADVERSE CLAIM.

In an action by an adverse claimant to sustain his claim and to have determined the relative possessory rights to portions of the ground sought to be obtained, where there is no question of forfeiture or abandonment, the question of whether the required assessment work has been done or the required amount of improvement been made is immaterial.

Roberts v. Oechsli (Montana), 172 Pacific 1037, p. 1038.

PERFORMANCE BY COOWNER—RECORD OF SERVICE OF NOTICE.

The United States statutes (section 2324) provides that on the failure of a coowner of a mining claim to perform or to contribute to the performance of his part of the assessment work, the interest of the delinquent coowner may, upon proper notice, be forfeited. The statute of California (Civil Code, sec. 14260) provides that when the notice required by section 2324 of the United States statutes is given it may within 90 days be recorded in the office of the proper county recorder and it shall be prima facie evidence that the delinquent coowner has failed to contribute to the assessment work.

Robinson v. Griest (California), 173 Pacific 88, p. 89.

PERFORMANCE BY COOWNER—BURDEN OF PROOF.

A coowner of certain mining claims began an action against the other coowner to remove or to prevent a cloud on the title. He alleged in his complaint that he had paid his full share for work done upon the mines. The answer of the defendant, the other coowner, denied the allegations of the complaint and it devolved upon the complainant to prove the fact of the payment of his full share of the assessment work, and in the absence of such proof the court erred in denying the defendant's motion for nonsuit.

Robinson v. Griest (California), 173 Pacific 88, p. 89.

NOTICE TO COOWNER TO CONTRIBUTE—TIME OF FILING—INJUNCTION TO PREVENT FILING.

The statute of California (sec. 14260, Civil Code) provides that a notice to a coowner to contribute to the assessment work on a mining claim with the proof of service on the coowner may be filed with the county recorder within 90 days after the service of the notice. The filing of the notice and proof within the time shows prima facie that the interest of the noncontributing coowner is subject to forfeiture. The alleged delinquent coowner can not maintain an action to enjoin the other coowner from filing the proof of the notice of delinquency after the expiration of the 90 days from the date of service, as the filing of the proof after the expiration of the time provided casts no cloud upon the title and is not then prima facie evidence of a right of forfeiture.

Robinson v. Griest (California), 173 Pacific 88, p. 89.

See California Mining Statutes, Annotated, 140.

FAILURE OF COOWNER TO CONTRIBUTE—FORFEITURE—QUIETING TITLE—PRIMA FACIE PROOF.

A coowner of mining claims sought by cross-complaint to quiet title to the mining claim in himself as against his coowner on the ground that the coowner had failed to contribute his share to the performance of the assessment work and that notice of such failure had been duly recorded in the office of the proper county recorder. The proof shows that the cross complainant failed to file the notice served upon the coowner within the 90 days as required by the California statute and therefore the record does not constitute prima facie evidence under the statute and he was not entitled to a decree quieting his title in the absence of actual proof of the failure of his coowner to perform his part of the assessment work.

Robinson v. Griest (California), 173 Pacific 88, p. 89.

ABANDONMENT.

CONDITIONAL ABANDONMENT.

The owners of a valid mining claim consented to the location of a second claim upon and over a part of their claim upon the condition and pursuant to an agreement that the second locator and his claim should be charged with a one-fourth interest in a tunnel site in favor of the owners of the first location. The consent of the owners of the first location to the second location upon and over a part of their claim was equivalent to an abandonment by them of that part of the claim; and the acceptance of the conditions pursuant to the agreement and the location by the second location subjected the sec-

ond locator and his claim to the charge of a one-fourth interest in the tunnel site and the second location when made stood charged accordingly.

Walsh v. Klienschmidt (Montana), 173 Pacific 548, 549.

RELOCATION.

VALIDITY OF JUNIOR LOCATION.

It is not correct to say that a prior mining location, which subsequently fails, so absolutely withdraws the land from entry as to defeat a junior location of the same ground otherwise valid.

Walsh v. Klienschmidt (Montana), 173 Pacific 548, 549.

INVALID AS TO EXISTING LOCATION.

Where there has been a valid location of a mining claim followed by the performance of the annual assesment work, there can be no relocation of any part of the ground embraced in an existing valid location. The attempted relocation of any part of the ground embraced in an existing valid location is void and confers no rights whatever upon the relocater; and a purchaser of ore from such a relocater, though in actual possession of a part of the ground embraced in the original location, is not an innocent purchaser and may be liable to the original locator for the value of the ore so purchased.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 70.

POSSESSORY RIGHTS.

ADVERSE POSSESSION—INSTRUCTIONS BY COURT.

In an action by an adverse claimant, brought pursuant to the statute, on an adverse claim filed by him against the granting of a patent to the applicant, the defendant, the applicant for the patent, pleaded the statute of limitations of the State of Nevada and introduced evidence tending to show not only that there was a discovery within the boundaries of each of his lode claims in controversy years before the entries thereon and the placer locations claimed by the adverse claimant, but that for many years, more than are required by the Nevada statute of limitations, the lode claims had been possessed, worked, and claimed as lode mining ground adversely to all the world except the Government. Under these facts it was error for the court to refuse to instruct the jury on the subject of the adverse holding by the defendant and his predecessors in interest.

Ralph v. Cole, 249 Federal 81, p. 92.

ADVERSE POSSESSION—PERIOD OF STATUTE OF LIMITATIONS.

In an action on an adverse claim as required by the statute, a finding by the court to the effect that the defendant, the applicant for patent to the disputed ground, had been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute, claiming title thereto adversely to the plaintiff, the adverse claimant, for a period greater than the statute of limitations of the State in which the claim is situated, prior to the commencement of the suit on the adverse claim, constitutes a complete bar to the action.

Ralph v. Cole, 249 Federal 81, p. 93.

POSSESSORY ACTIONS.

SUIT BY ADVERSE CLAIMANT—RIGHT TO POSSESSION.

In a suit by an adverse claimant to quiet his title the plaintiff's right of ownership and possession is in no way dependent upon a prescriptive title, and he is not required to prove possession of the claim for more than five years prior to the commencement of the action; but it is sufficient to prove and for the court to find that at the commencement of the action the plaintiff was the owner and entitled to the possession of the mining claim.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 100.

PROOF TO SUSTAIN.

To maintain an action for the possession of a mining claim in the State of Nevada and under the statutes of that State, the plaintiff must show by proper evidence that he, or those through or from whom he claims "were seized or possessed of such mining claim, or were the owners thereof according to the law and customs of the district embracing the same within two years next before the commencement of such action."

Ralph v. Cole, 249 Federal 81, p. 93.

ADVERSE POSSESSION—TRIAL OF RIGHTS—VENUE.

An action involving the title and ownership of minerals alleged to have been wrongfully mined and removed from the mining claim of the complainant, can not be maintained in the court of a foreign State to recover the value of the minerals so mined and taken from an innocent purchaser of the original trespasser where it appears that the alleged trespasser was in the peaceable adverse possession of the mining claim at the time the minerals were so mined and re-

moved, as this involves the title to the mining claim as between the original parties and it is the policy of the law that such an issue should be tried in the local court where the property is situated.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals). 203 Southwestern 68, p. 70.

DESCRIPTION.

DESCRIPTION OF CLAIM—SURVEYOR'S MAP.

A map made by a surveyor showing a description and location of a mining claim in controversy is sufficiently supported where the surveyor testifies that he found fixed monuments on certain corners and on one side line of the claim and that in surveying he considered both the data on the ground as well as that given in the notice of location.

Batt v. Steadman (California Appeals), 173 Pacific 99, p. 101.

STATE STATUTES.

EFFECT ON MINING LOCATIONS—STATUTE OF LIMITATIONS.

The statute of Nevada provides that no action for the recovery of mining claims shall be maintained unless the plaintiff was possessed of the same within two years before the commencement of the action. It also provides that occupation and adverse possession shall consist in holding and working a mining claim in the usual and customary mode. Proof that a claimant has been in possession of the disputed ground either by himself or his predecessors in interest for more than the period prescribed by the statute of limitations, together with proof of working the same as required by law, is sufficient to entitle him to the right of possession, where his recorded location notice recited the fact of a discovery as such recital "creates a presumption of discovery of mineral and of a valid location."

Ralph v. Cole, 249 Federal 81, p. 92.

MINERS' RULES AND REGULATIONS.

EFFECT ON MINING LOCATION.

Prior to the passage of any mining law by Congress, both the Land Department and the courts always acted upon the rule that all mining locations were to be governed by the local laws, rules, and customs in force at the time of the location. Such practice was clearly intended by Congress as shown by the provisions of section 2 of the original act of July 26, 1866 (14 Stats. 251), as well as by section 2332 (United States Revised Statutes 1878).

Ralph v. Cole, 249 Federal 81, p. 87.

PLACER CLAIMS.**USE OF WATER.**

A placer mining claim without water is only a site for a mine, and is in fact a mere prospect.

Roseburg National Bank v. Camp (Oregon), 173 Pacific 313, p. 315.

ADVERSE CLAIM.**FILING—CONTEST TRANSFERRED TO COURT.**

On the filing of an adverse claim to an application for a patent as required by section 2326 (Revised Statutes 1878), the adverse claimant is required, within 30 days, to commence proceedings in a court of competent jurisdiction to determine the right of possession; and he must prosecute his action with reasonable diligence to final judgment. The question thus to be transferred from the Land Office to a court of competent jurisdiction for decision is that of the right of possession of the mining ground respecting which the contest arose in the Land Office; but the proceedings in the Land Office are suspended, the title to the ground remaining in the Government for disposal in accordance with the judgment of the court, and on compliance with all requirements of the statute. No form of action is prescribed by the statute and no court other than one of competent jurisdiction is designated.

Ralph v. Cole, 249 Federal 81, p. 87.

See United States Mining Statutes, Annotated, 447.

AMENDMENT OF STATUTE—PRACTICE.

The act of July 26, 1866 (14 Stats. 251), in which provision was made for contests between rival claimants of a mining location by the filing of adverse claims in the Land Office and their subsequent trial in a court of competent jurisdiction, was made more specific by the act of May 12, 1872 (17 Stats. 91). On the revision of the United States statutes in 1878, the provisions for application for patent and filing and determining of adverse claims were carried into the revision as sections 2325 and 2326.

Ralph v. Cole, 249 Federal 81, p. 87.

PROCEDURE AND TRIAL—JURISDICTION OF FEDERAL AND STATE COURTS.

Section 2326 (Revised Statutes 1878) requires an adverse claimant, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the relative rights of the parties to the ground in controversy. The adverse suit to

determine the right of possession may not involve any question as to the construction and effect of the Constitution or the laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs, or the effect of State statutes, and is not necessarily a suit that must be brought in a Federal court. Such suits may sometimes so present questions arising under the Constitution and laws of the United States that the Federal courts will have jurisdiction, regardless of the citizenship of the parties, but the mere fact that such an adverse suit is authorized by the statutes of the United States is not in and of itself sufficient to vest the jurisdiction in the Federal courts.

Ralph v. Cole, 249 Federal 81, p. 90.

ACTION TO DETERMINE RIGHTS—ACTION AT LAW—JURY TRIAL.

The pleadings in an action commenced on an adverse claim, as required by section 2326 (Revised Statutes 1878), show the action to be one at law where the sole issue is the right of possession of the respective mining claims or of the ground in controversy. In such a case either party is entitled to a trial by jury, or the parties may stipulate for such a trial in a Federal court having jurisdiction because of diverse citizenship.

Ralph v. Cole, 249 Federal 81, p. 90.

TRIAL AND FINDING OF JURY.

Section 2326 (Revised Statutes 1878) was amended by an act of March 3, 1881 (21 Stats. 505), to the effect that in the trial of an action brought by a claimant to determine his adverse claim, if title to the ground in controversy should not be established by either party, the jury should so find and judgment must be entered accordingly.

Ralph v. Cole, 249 Federal 81, p. 87.

ACTION BY ADVERSE CLAIMANT—NATURE—TRIAL BY JURY.

It was not the intention of section 2326 (United States Revised Statutes 1878), providing for a trial on the filing of an adverse claim, to change the method of trial, but its object was to provide for an adjudication of the right of possession and to prevent the applicant from obtaining a patent if the adverse claimant failed to sustain his claim and where the applicant himself failed to prove his right of possession. The duty was imposed on the court trying

the case to enter such judgment or decree as would evidence that the applicant had not established his right of possession and was therefore not entitled to a patent.

Ralph v. Cole, 249 Federal 81, p. 87.

TRIAL BY COURT OR JURY.

If Congress had intended to provide that litigation as provided in the amendatory act of March 3, 1881 (21 Stats. 505), to section 2326 (Revised Statutes 1878) must be an action at law, or must invariably be tried by jury, it would have said so in plain terms. But there is nothing to indicate the intention thus to circumscribe a resort to the accustomed modes of procedure or prevent the parties from submitting the determination of their controversies to the court.

Ralph v. Cole, 249 Federal 81, p. 87.

See United States Mining Statutes, Annotated, 452.

QUESTIONS DETERMINED IN SUIT:

In an action brought by an adverse claimant after filing his adverse claim, his right to a patent for the land is not settled by the judgment of the court beyond the right of inquiry by the Government; and the judgment does not necessarily give the claimant a right to the land in controversy.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 410.

See United States Mining Statutes, Annotated, 483.

PROOF OF ASSESSMENT WORK IMMATERIAL.

An adverse claimant brought an action to have determined the relative rights of himself and the applicant for patent to portions of the ground claimed by each. No question of forfeiture or abandonment was involved, and the question whether the applicant for patent had performed the assessment work or had made improvements to the value of \$500 can not be material on the trial of an action between an adverse claimant and the applicant for patent.

Roberts v. Oechsli (Montana), 172 Pacific 1037, p. 1038.

PATENTS.

PROCEEDINGS FOR OBTAINING—CONCLUSIVENESS.

The law intended in every instance where there was a possibility of a conflict of claims to give an opportunity to have such conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issuance of a patent to either claimant. The wisdom of the provision is apparent when its effect is

considered upon the value of the patent which is thereby rendered conclusive as to all rights that could have been asserted in the proceedings. An opportunity is given to determine such conflict in the form of an action in a court of the viscinage, where witnesses can be produced and a jury, of miners if desired, can pass upon the rights of the parties, under instructions as to the law from the court. The parties and the Land Office are governed by the decision of the court, and if the court decides for one party or the other or against both parties, the Land Department is bound by the decision.

Ralph v. Cole, 249 Federal 81, p. 89.

PROCEDURE AFTER JUDGMENT ON ADVERSE CLAIM.

After the judgment of a court on an adverse claim on the question of the right of possession, the Land Department may still pass upon the sufficiency of the proofs to ascertain the character of the land, and to determine whether the conditions of the law have been complied with in good faith.

Lane v. Cameron, 45 Appeal Cases (D. C.) 404, p. 410.

MINERAL CHARACTER OF LAND—CANCELLATION OF ENTRY—NOTICE.

Two locators of a placer claim made joint application for patent and on investigation of the mineral character of the land by the Land Department an entry was authorized. Subsequently on application by a homestead entryman for patent and on investigation by the Land Department, his application was passed to entry. Before either entry was passed to patent a rehearing was ordered to determine the true character of the land. Notice of the rehearing was given to the homestead entryman and to one of the placer entrymen, but not to the other. On the rehearing, the land was found to be valuable only for agriculture and to have no value for placer mining, and the homestead entry was passed to patent. In an action to quiet title by the homestead patentee against the placer entryman not notified of the rehearing, he was entitled to assert and show that the tract was valuable for placer mining as originally found by the land officers, as the finding of the Land Department in his absence was not conclusive of the character of the tract, as against him.

Kirk v. Olson, 38 Supreme Court Rep. 114, p. 115.

CANCELLATION—MINERAL CHARACTER OF LAND—SUBSEQUENT DISCOVERY.

To justify the cancellation of a patent under a railroad grant as wrongfully covering mineral lands, it must appear that at the time of the order granting the patent the land was known to be valuable

for minerals; that is, it must appear that the then known conditions were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. But if the land was not then known to be valuable for minerals, subsequent discoveries can not affect the validity of the patent.

Southern Pacific Co. v. United States, 249 Federal 785, p. 804.

VALIDITY—COLLATERAL ATTACK.

A collateral attack upon a patent is authorized where the basis of the attack is that the patent shows upon its face that it is void.

Meade v. Steele Coal Co. (Kentucky), 203 Southwestern 1061.

ADVERSE CLAIM—NEITHER PARTY ENTITLED TO PATENT.

The proceedings provided for under section 2326 United States Revised Statutes, as supplemented by the act of March 3, 1881 (21 Stats. 505), were merely in aid of the Land Department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title or right of possession, as where judgment was rendered in favor of either. If the adverse claimant chooses to proceed by a bill to quiet title, and if neither party is entitled by the proof to relief the court can render a decree to that effect, the same as if judgment was rendered on a verdict in an action at law.

Ralph v. Cole, 249 Federal 81, p. 87.

COAL LOCATIONS.

VALIDITY OF COAL LOCATION.

Sections 2347 to 2351, Revised Statutes of United States, impose certain restrictions in making coal locations on the public lands, and expressly forbid individuals and associations from acquiring coal land in excess of the quantities prescribed, whether directly by entries in their own names or indirectly by entries made for their benefit in the names of others. One person can not lawfully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit thereof, or in the interest of a person or association where he or it has not had such benefit but is seeking through entries made, or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by law.

United States v. Kirk, 248 Federal 30, p. 35.

CANCELLATION OF PATENT—NOTICE TO OFFICER OF CORPORATION.

The United States brought suit to cancel a patent for coal land on the ground of fraud. The proof showed that the vice president of the defendant coal company procured the entries to be made in the name of a third person for the benefit of the coal company, paying all the expenses and the purchase price of the land from the funds of the company. The coal company, under this proof, is chargeable with the knowledge possessed by its vice president and agent, and although it paid a valuable consideration, it took with notice of the fraud and can not hold the title.

United States v. Routt County Coal Co., 248 Federal 485, p. 486.

OIL LOCATIONS.

WORK LEADING TO DISCOVERY—GROUP CLAIMS.

The statute of the United States called the Pickett Act of June 25, 1910 (36 Stats. 847), provides that the rights of a bona fide occupant or claimant of oil or gas bearing lands who at the date of a withdrawal order is in diligent prosecution of work leading to a discovery of oil or gas shall not be affected by such order, if he shall continue in diligent prosecution of the work. A locator of an oil location had in June, 1909, encountered large quantities of gas in drilling operations on one of a group of oil claims. As soon as the gas was under control drilling continued and oil was discovered on February 1, 1910. On September 27, 1909, the land by presidential order was withdrawn from oil discovery and development. During the year prior to the order of withdrawal a cabin and skeleton derricks had been constructed on different quarter sections and in that manner and in the building of roads, making surveys, piping water, and otherwise providing for the general development of the property, the locator had spent considerable sums of money. Pending application for patents the United States brought suit to enjoin the locator from drilling further wells on the disputed tract and for the appointment of a receiver for the wells in operation. The question is, under such conditions, whether or not the group system of development can be applied. The testimony was sufficient to warrant the conclusion that future operations on the unpatented sections depended entirely upon the results obtained from the drilling on a particular section. But the drilling of a well on one location can not, where the group theory is inapplicable to the several locations, be treated as work leading to discovery on the other locations.

United States v. Honolulu Consolidated Oil Co., 249 Federal 167, p. 168.

United States Mining Statutes, Annotated, 1044.

DISCOVERY—SUFFICIENCY—PROBABILITY NOT SUFFICIENT.

Conditions which suggest the possibility of oil in paying quantities and sufficient to induce the more venturesome such as are willing to take chances to prospect the field is not sufficient to constitute discovery where such conditions were not plainly such as to engender the belief that any given section or other legal subdivision of the land in controversy contains oil of such quality and quantity and at such depth as would render its extraction profitable.

Southern Pacific Co. v. United States, 249 Federal 785, p. 804.

OPERATIONS ENJOINED—RECEIVERSHIP.

In a suit by the United States Government to enjoin the further drilling of wells on oil locations a receiver may be appointed for a limited period and with limited authority where little harm or inconvenience will result to the locator, and where the product of a completed well is practically impounded under an existing contract, and where it is not clear that further drilling was intended until pending controversies between the Government and the locator were settled.

United States v. Honolulu Consolidated Oil Co., 249 Federal 167, p. 168.

TRESPASS.**INNOCENT PURCHASER OF ORE—RECOVERY BY ORIGINAL OWNER.**

A person who has made a valid location of a mining claim on the public land and maintained the same by the performance of the annual assessment work, may recover ore or its value in an action against the purchaser thereof from a person who wrongfully entered upon the mining claim and without right dug and removed the ore therefrom, where the owner of the claim did not consent to the mining and removal of the ore; and he does not by his mere silence lose his right to recover the ore or its value from a purchaser.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 70.

LIABILITY FOR ORE MINED AND APPROPRIATED—DAMAGES.

Trespassers upon a valid location, who mined and removed ore therefrom, are not entitled to recover for expenses in taking out the ore; nor can a purchaser of ore from such trespassers, in an action against him by the original locator and owner for the value of the ore so taken, claim any credit or allowance for the expenses in the mining and taking of the ore by the trespassers.

Kelvin Lumber & Supply Co. v. Copper State Min. Co. (Texas Civil Appeals), 203 Southwestern 68, p. 70.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

RELATIVE DUTIES OF OPERATOR AND MINE FOREMAN—SAFE PLACE.

The question as to liability of a mine owner for injuries caused by the position of the post along a mine tract has not been settled by the Pennsylvania court. But the rule now stated is that where the act imposes upon the mine owner a specific duty as to the arrangement and management of the mine, the mine owner can not protect himself from liability by showing that the structure in question was put up by the direction of the mine foreman, at least when the fact of its existence become known to the owner. In such case it would be the duty of the owner to remove the dangerous structure. On the other hand, where the act does not call for any particular arrangement or structure, then the arrangement or structures ordered by the mine foreman for the purpose of supporting the roof of the mine are obligatory on the mine owner and he is not responsible for injuries caused thereby.

Whittaker v. Valley Camp Coal Co. (Pennsylvania), 103 Atlantic 594, p. 595.

APPLICATION OF STATUTE—EFFECT OF CUSTOM.

The statute of Kentucky on the question of propping the roof of a mine applies only to those miners or workmen charged with the duty of propping, and does not in terms impose upon every miner the duty of complying with the statute. Accordingly the custom of a mine may be proved for the purpose of showing upon whom the duty of propping devolved; but the effect is not to change the statutory requirement by custom. A mine operator's rules may impose upon every miner the duty of doing his own propping, and yet the proof may show that such rules had been waived and that it was the custom of the mine, since beginning its operations, to have a timberman whose duty it was to do the propping at such places as the miners were required to work. Under these circumstances the fact that the miner failed to prop his roof and was killed by a fall of slate from the roof will not prevent a recovery because of the alleged failure of the decedent to comply with the statute and the rules of the mine operator.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534, p. 535.

DUTIES IMPOSED ON OPERATOR.**DUTY TO FURNISH SAFE PLACE.**

A mine operator may be liable for a failure to use ordinary care to furnish a miner a reasonably safe place for work; and the exception to the safe place doctrine is not applicable because the miner himself was creating the danger in the progress of his work, does not apply, where the duty of propping devolved upon the mine operator and not upon the miner; nor can the mine operator escape liability on the ground that the miner was engaged in removing the coal at the time of the accident and the operator had no opportunity to prop the roof. But the fact was that the coal had been removed some time before and the company's timberman had been sent to do the propping and had abundance of time in which to do so. Under these circumstances the mine operator was charged with the duty of using ordinary care to make the working place reasonably safe, and in an action for the death of the miner, caused by a fall from the roof, the question of the exercise of such care was to be determined by the jury.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534, p. 536.

SAFE PLACE—DUTY AS TO ENTRIES.

The bituminous mine act of 1893 (P. L. 52 (78)), provides that a mine owner shall see that the entries where braking is necessary shall have a clear level width of not less than $2\frac{1}{2}$ feet between the sides of the cars and the rib to allow the driver to pass his trip safely and keep clear of the cars. But whether this requires a space of $2\frac{1}{2}$ feet to be left between the cars on a switch and a row of posts, and another way of $2\frac{1}{2}$ feet on the other side of the posts between the posts on the main track, is left in doubt.

Whittaker v. Valley Camp Coal Co. (Pennsylvania), 103 Atlantic 594, p. 595.

VENTILATION—DUTY NONDELEGABLE.

Section 40 of the Alabama statute (Acts 1911, p. 515) makes no practical change in section 1016 of the Code of 1907 except to include explosives as well as noxious gases and also to provide that the minimum amount of air to be supplied shall be 100 cubic feet per minute per man and 500 cubic feet per mule or horse. It was the intention of the legislature to protect the miner from the danger of noxious and explosive gases generated in mines.

Segrest v. Roden Coal Co. (Alabama), 78 Southern 756, p. 757.

KEEPING MINE FREE FROM GAS—STANDARD OF DUTY.

Section 1016 of the Alabama Code (1907) makes it the imperative duty of a mine owner or superintendent to keep the mine swept out and free from noxious gases generated therein; and this is a non-delegable duty, and the mere furnishing of the means is not sufficient.

Segrest v. Roden Coal Co. (Alabama), 78 Southern 756, p. 757.

VENTILATION—REQUIREMENT AS TO AIR.

The statute of Alabama (sec. 40, act of 1911, p. 515) requires a mine operator to keep his mine free from noxious and explosive gases, and that the minimum amount of air to be supplied shall be 100 cubic feet per minute per man and 500 cubic feet per mule or horse. Under this statute it is not sufficient to prove the means for supplying the air, but the operator is required to provide and maintain the same, the air or ventilation, to the extent required by the statute, and to supply the air to the extent of accomplishing the purpose; and there would be a violation if the purpose was not accomplished whether it was due to the insufficiency of the means or of a failure to operate and maintain the same even if amply and sufficiently provided for.

Segrest v. Roden Coal Co. (Alabama), 78 Southern 756, p. 757.

DUTY TO FURNISH PROPS.

The statute of Alabama (General Acts 1911, 500, p. 514) requires a mine operator to keep at a convenient place at or near the main entrance to the mine, or in the mine, a sufficient supply of props and other timbers of suitable lengths and sizes to be furnished on request by the miners. But the mine operator is only required to deliver the props or timbers of proper length only when needed and requested and designated by the miner.

Clark v. Choctaw Min. Co. (Alabama), 78 Southern 372.

FURNISHING PROPS—NOTICE OF PLACE OF DELIVERY—PROOF.

The statute of Alabama (General Acts 1911, 500, p. 514) requires a mine operator to keep ready for use a sufficient supply of props and other timbers of suitable lengths and sizes to be used in the mine. The statute makes it the duty of the miner who needs props or other timbers to select and mark the same when needed, designating on such props or timbers the place at which the same are to be delivered, or give notice to the person whose duty it is to deliver the props of

the kind and number of props needed and of the place at which they are to be delivered. In an action by a miner for damages for injuries occasioned by the alleged failure of the mine operator to furnish props it was alleged that the miner designated on a blackboard used for that purpose the number and kind of props and timbers needed in his working place and designated the place at which they were to be delivered; but there can be no recovery under such an allegation where the evidence failed to show that notice was given to the mine operator of the place at which the props and timbers to be used in the miner's working place should be delivered.

Clark v. Choctaw Min. Co. (Alabama), 78 Southern 372, p. 373.

AGREEMENT AND CUSTOMS—DUTIES RELATING TO PROPPING.

The former statute of Kentucky did not in terms impose upon either the mine operator or miner himself the duty of propping, and whether the duty was imposed upon the one or the other could be shown by the agreement of the parties or the custom of the mine. But the rules of a mine are not conclusive evidence of the terms of a contract of employment or the custom of a mine, as these may be waived.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534, p. 535.

VIOLATION BY OPERATOR.

FAILURE TO EMPLOY MINE FOREMAN—FOREMAN FOR SEPARATE MINES.

The placing of a single mine foreman and his assistants in charge of several separate mines without underground connection, the mines being separate and distinct working places, is not a compliance with the terms of the Pennsylvania statute (P. L. 1891, p. 176). This statute contemplates a foreman in each mine, including all underground workings and excavations connected below the surface and operated by one general system of ventilation and haulage, but it does not include distinct and separate systems.

Kolalsky v. Delaware & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 723.

VIOLATION OF REQUIREMENT—QUESTION OF FACT.

The statute of Pennsylvania (Laws 1893, p. 52 (78)) requires the mine owner to see that entries where tracks are laid and braking is necessary shall have a clear level width of not less than $2\frac{1}{2}$ feet between the sides of the cars and the rib to allow the driver or brakeman to pass his trip safely and keep clear of the cars. The main hauling tracks and the switch in an entry were laid about 5 feet apart; between the track and the switch there was set by order of the

mine foreman a row of posts necessary to support the roof. These posts left a space of not more than 3 or 4 inches between them and the cars standing or running on the switch, but leaving a clear space of something more than $2\frac{1}{2}$ feet between the main track and the line of posts. The posts were from 13 to 15 feet apart. A brakeman operating the brakes on the cars on the switch was caught between a car and one of the posts and injured. In an action by the brakeman for damages for the injuries so occasioned, the court held that in view of the doubt whether the statute positively required a space of $2\frac{1}{2}$ feet between the cars on the siding or switch and the posts, as well as $2\frac{1}{2}$ feet between the posts and the cars on the main track, the question of the negligence of the mine operator in permitting the setting of the posts and in operating the cars on the siding with a space of not to exceed 4 inches between the cars and the posts was one of fact to be determined by the jury, and was not under the statute a question of law for the court.

Whittaker v. Valley Camp Coal Co. (Pennsylvania), 103 Atlantic 594, p. 595.

FAILURE TO FURNISH SAFE PLACE—LIABILITY.

The complaint of a miner for injuries caused by a fall of the roof alleged a defect in the ways, works and plant of the mine operator in that the roof of that part of the mine where the complainant was set to work was cracked, and had not sufficient strength or cohesive power to hold itself together and was not properly supported and that the defect arose from or had not been discovered or remedied owing to the negligence of the mine operator or his superintendent. The proofs showed that the miner on entering his working place sounded the roof and found that it sounded all right; that he examined the rock in the roof to see whether it was dangerous and whether it was safe for him to work and made what he considered a careful examination and thought it was safe enough to work under. The miner himself was experienced and was as competent to sound roofs and tell when a roof is safe as any other person. Under such circumstances the mine operator was not liable for negligence in failing to inspect or discover the defect.

Red Eagle Coal Co. v. Thrasher (Alabama), 78 Southern 718.

STRUCTURES ERECTED BY MINE FOREMAN—DUTY AND LIABILITY OF OPERATOR.

The statute of Pennsylvania imposes upon a mine owner or operator a specific duty as to the arrangement and management of his mine, and the owner or operator can not protect himself from liability by showing that the structure in question was put up by the direction

of the mine foreman, at least where the fact of its existence became known to the owner, and if dangerous or if it rendered the mine an unsafe place for miners to work, it would be his duty to remove such structure.

Whittaker v. Valley Camp Coal Co. (Pennsylvania), 103 Atlantic 594, p. 595.

DUTIES IMPOSED ON MINE FOREMAN.

DUTY AND LIABILITY OF MINE OPERATOR.

Where the statute of Pennsylvania does not call for any particular arrangement or structure as to the method of underground operations in a mine, the arrangement or structures ordered by the mine foreman for the purpose of supporting thereof are within the statutory powers of the mine foreman and over which the mine operator has no authority or jurisdiction and the operator can not be held liable for an injury to a miner caused by defective or unsafe structures or posts placed or set by the direction of the mine foreman.

Whittaker v. Valley Camp Coal Co. (Pennsylvania), 103 Atlantic 594, p. 595.

CONSTRUCTION OF ENTRIES—AUTHORITY OF MINE FOREMAN—KNOWLEDGE OF DANGER.

Under the statute of Pennsylvania, the mine operator is not responsible for the work done in the course of the construction of passageways and the mine operator can not be held liable for an injury to a miner caused by a fall of rock from the roof of a new and incomplete entry where the underground operations were under the control of a statutory mine foreman and where the mine foreman had directed the miners to pass through the new entry in going to and from their work, and where the mine foreman knew that the roof was dangerous and where it did not appear that either the mine operator or the mine superintendent had any knowledge of the new entry or that it was being used by the miners as a passageway and where the use by the miners of the new entry as a passageway prior to the accident was of such short duration that knowledge of its condition could not be imputed to the mine operator or his superintendent.

Cossette v. Paulton Coal Min. Co. (Pennsylvania), 103 Atlantic 346, p. 347.

CONSTRUCTION OF PASSAGEWAYS.

Under the general provisions of the Pennsylvania statute (P. L. 1911, p. 756), placing the workings of a mine under the mine foreman's charge and supervision, the mine foreman is responsible for all work in the course of construction of passageways, and a mine operator can not be held liable in damages for injuries to a miner caused

by a fall of rock from the roof of an entry that was in the course of construction and incomplete and where the mine foreman permitted the injured miner and others to pass through such incomplete entry.

Cossette v. Paulton Coal Min. Co. (Pennsylvania), 103 Atlantic 346, p. 347.

FAILURE TO PERFORM—LIABILITY OF OPERATOR—FAILURE TO MAKE REFUGE HOLES.

The duty to see that refuge holes along motor roads in coal mines are maintained as required by the statute of West Virginia (Code 1916, ch. 15H, sec. 36d (2)) rests on the mine foreman and not on the mine operator, and for an injury to a miner resulting from defects therein the mine operator is not liable.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 584.

Strother v. United States Coal & Coke Co. (West Virginia), 95 Southeastern 806.

FAILURE TO MAKE OVERCAST—LIABILITY OF MINE OPERATOR.

The statute of West Virginia (Barnes' Code 1916, ch. 15H, sec. 63d (2)) requires the mine foreman to make or direct excavations for overcasts in the roofs of haulways or air courses in coal mines as the operations therein progress, for properly ventilating the mine and make the places to work therein safe. His negligence in the performance of these duties, unless he is authorized by the master to represent him in other ways incompatible with his statutory duties, can not be imputed to the mine owner or operator and render him liable for personal injuries sustained that are due to such negligence.

Strother v. United States Coal & Coke Co. (West Virginia), 95 Southeastern 806.

PRESUMPTION AS AGENT OF MINE OPERATOR.

The mere fact that a person was a mine foreman employed in a mine, without more, does not authorize any one to assume that he represents the mine operator in any other capacity than as a statutory officer. It seems that the presumption should be that the mine foreman has no authority to act for the mine operator, especially where his duties as a mine foreman are incompatible with his duties as a representative of the mine operator.

Strother v. United States Coal & Coke Co. (West Virginia), 95 Southeastern 806, p. 808.

PROOF OF RELATION—FOREMAN OR SUPERINTENDENT—QUESTION OF FACT.

The Pennsylvania statute (P. L. 1891, p. 176) defines a superintendent as a person who shall have on behalf of the owner general supervision of one or more mines or collieries. The fact that an em-

ployee had authority to hire and discharge men and direct the manner in which entries should be driven and the mine developed was not inconsistent with his position as a mine foreman, and the fact that he was called superintendent was not sufficient to make him one, but his position as either superintendent or mine foreman was one of fact.

Kolalski v. Delaware & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 722.

VIOLATION BY MINE FOREMAN.

FAILURE TO PERFORM STATUTORY DUTY—LIABILITY OF MINE OPERATOR.

If a mine operator has employed a competent and qualified mine foreman, as required by the statute of West Virginia, the negligence of the mine foreman in the discharge of the duties imposed upon him by statute in the operation of the mine is not chargeable to the mine operator.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 584.

See Williams v. Thacker Coal & Coke Co., 44 West Virginia 599, 30 Southeastern, 107, 40 L. R. A. 812.

Jaggie v. Davis Collieries Co., 75 West Virginia 370, 84 Southeastern 941.

FAILURE TO PROP ROOF—OPERATOR LIABLE.

A mine superintendent marked out a space 15 feet wide and directed a miner to excavate to the depth of 30 feet for the purpose of installing a pump to remove water that had accumulated in the mine. The miner called the superintendent's attention to a rock projecting some distance into or over the space so marked. The superintendent after striking the rock with a pick informed the miner that it was "all right," and directed him to "go to work." The miner subsequently requested props for the rock and the superintendent promised to provide the same. After an absence the miner returned to know if the props had been supplied and as he stepped to one side of the track to permit a car to pass the rock in question fell inflicting the injuries for which he sued. Under such circumstances the mine owner's duty is governed by the statute (P. L. 1891, p. 176), which requires a mine owner, superintendent, or foreman to provide props necessary for the safe mining of coal and protection of the lives of the workmen, and makes the failure to do so negligence per se in an action for damages for injuries due to insufficient propping.

Kolalsky v. Delakare & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 723.

DIRECTING MINERS TO USE DANGEROUS ENTRY—LIABILITY OF OPERATOR.

A mine foreman in charge of a mine under the statute of Pennsylvania (P. L. 1911, pp. 756, 762) knew of an unfinished entry and the defective condition of the roof and that miners were passing through

such defective entry to and from their work, but posted no danger signals and nothing to guard and protect the miners against or from the existing danger, but permitted them, and even suggested to them that they might pass through such incomplete entry. A miner while passing through the entry was injured by a fall of slate from the roof. Under such circumstances the mine operator can not be charged with negligence and held liable for the injury, but the injury must be attributed to the negligence of the mine foreman who was, by the statute, given full charge of the inside workings.

Cossette v. Paulton Coal Min. Co. (Pennsylvania), 103 Atlantic 346, p. 347.

DUTIES IMPOSED ON MINER.

REQUEST FOR PROPS—STATUTORY METHOD FOR MAKING.

The statute of Kentucky (sec. 2726, subsec. 5) provides that miners in need of props and timbers shall notify the mine foreman at least one day in advance, giving the number, size, and length of props, cap pieces, and timbers required. But in case of emergency props may be ordered immediately upon the discovery of danger. Where the duty of propping devolves upon a miner he must request props in the manner pointed out by the statute, and the statutory requirement can not be changed by the custom of a mine so as to impose upon the mine operator a liability for failure to furnish props when the statute itself was not complied with.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534.

REQUEST FOR PROPS—DEMAND ON INDEPENDENT CONTRACTOR.

An independent contractor had six or seven rooms in a mine which he was having mined under his contract with the mine operator. One of the miners employed by such independent contractor placed upon the blackboard opposite the contractor's name a request for props and timbers, but did not designate the place at which the props and timbers were to be delivered. In an action by the miner for damages for injuries caused by the failure of the mine operator to supply the props and timbers, there was no evidence that the independent contractor was the representative of the mine operator to accept or receive the notice required by the statute. Proof that it was the contractor's duty to set the timbers up did not serve to prove compliance with the prerequisite of the statute requiring the mine operator to furnish the props and there could be no recovery against the mine operator in any event where the miner fails to designate the place at which the props and timbers were to be delivered.

Clark v. Choctaw Min. Co. (Alabama), 78 Southern 372, p. 373.

RIGHT TO STATUTORY PROTECTION.**APPLICATION OF STATUTE TO EMPLOYEE OF INDEPENDENT CONTRACTOR.**

The statute of Alabama (General Acts, 1911, 500, p. 514) requires a mine operator to keep at hand a sufficient supply of props and other timbers and supply the same to a miner on request. Whether this statute and the duty imposed has application otherwise than as between the master and servant, the mine operator and his miner only, is a question, the Alabama court says, of doubtful solution.

Clark v. Choctaw Min. Co. (Alabama), 78 Southern 372.

FELLOW SERVANT RULE—DEFENSE ABROGATED.**ASSUMPTION OF RISK ELIMINATED.**

The Indiana employers' liability act of 1911 (Burns 1914 Stats. sec. 8020) eliminates the defense of dangers or hazards inherent or apparent in the employment and abrogates the assumed risk rule as to the particular risk of a fellow servant.

Oolitic Stone Mills Co. v. Cain (Indiana Appeals), 119 Northeastern 1005, p. 1007.

EFFECT ON ASSUMPTION OF RISK.**KNOWLEDGE OF DANGER—ASSURANCE OF SAFETY—CONTINUING WORK.**

Where a miner requested a timberman to prop his roof and where the mine foreman had directed the timberman to prop the roof, and the timberman after examining the roof assured the miner of its safety, the miner by remaining in the place and continuing work does not assume the risk of the danger from the roof unless the danger was so obvious that a person of ordinary prudence in his situation would have refused to do so.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534, p. 536.

EMPLOYERS' LIABILITY ACT.**ALABAMA EMPLOYERS' LIABILITY ACT—PURPOSE AND CONSTRUCTION—
COMPETENCY OF WITNESS.**

The purpose of the Alabama employers' liability act (Code 1907, sec. 3910) was to repeal the general inhibition against persons testifying who were interested in the issue to be tried except in transactions between the estate of a deceased person and a person whose testimony was intended to be used. But the purpose was not to protect a defendant, a mine operator, charged with negligence, from the testimony of a witness, because the other party interested in the act in controversy was dead. Under the terms of the statute the exception

is confined to inhibiting the testimony where the transaction is with "the deceased person whose estate is interested in the result of the suit." But an action for the wrongful death of a miner is not for the benefit of his estate but for the next of kin under the statute; and a mine superintendent, who negligently directed the miner to work in a dangerous place, is a competent witness to testify as to the alleged dangerous condition surrounding the place where the miner was so directed to work.

Central Iron & Coal Co. v. Hammacher, 248 Federal 50, p. 52.

ACCEPTANCE OF PROVISIONS BY EMPLOYER—NOTICE TO EMPLOYEE.

The employers' liability act of Texas permits the employer to accept the provisions of the act and to take a policy in the Texas Employers' Insurance Association and thereby become a "subscriber" according to the provisions of the act; but the act requires the "subscriber" to give written or printed notice to the employee of the fact in order to avoid liability in a civil suit for damages. The provision of the act requiring such notice is absolutely necessary in order to create the relationship of subscriber between the employer and employee and without such notice the relation can not exist and the employer may be liable in a civil suit for damages.

Farmers' Petroleum Co. v. Shelton (Texas), 202 Southwestern 194, p. 109.

INDUSTRIAL INSURANCE LAW.

INDEMNITY INSURANCE—MINING COMPANY'S CONTRACT OF INDEMNITY—VALIDITY.

By an indemnity insurance policy a mining company as lessee of a mine agreed to indemnify the beneficiaries of the insurance policy against all cost, loss, and damages by reason of legal liability of the assured for and on account of bodily injury or death suffered through an accident by any employee of the assured while working for him in his mine. Such a contract is valid and binding on the mining company, although the injuries to the employees were caused by the negligence of the assured.

Harden v. Southern Surety Co. (Missouri Appeals), 204 Southwestern 34, p. 35.

WORKMEN'S COMPENSATION ACT.

ALASKA WORKMEN'S COMPENSATION ACT—VALIDITY—PROVISIONS FOR INDUSTRIAL INSURANCE.

The workmen's compensation act of Alaska does not contain any provision for industrial insurance, but it does contain regulations for securing payment for the compensation for injuries. A bond or

cash deposit by a mining company is provided for where beneficiaries of the deceased persons are concerned and out of which to meet the compensation to which they are entitled; and in an action for the stipulated compensation the employee has his attachment for securing the demand and it can not therefore be said that the employee is without provision looking to the eventual payment of his claim. The district court is constituted a tribunal for ascertaining the legitimacy of the claims and the amount, and the fact that the insurance feature is wanting does not render the law invalid.

Johnston v. Connecott Copper Corp., 248 Federal 407, p. 410.

WORKMEN'S COMPENSATION ACT OF ALASKA—CONSTITUTIONALITY—CLASS
LEGISLATION.

Classification of subjects for regulation by law is a function belonging to the legislative department of the Government. Generally, class legislation is prohibited, but legislation which is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated is not within the prohibition. The legislature possesses a wide scope of discretion in the exercise of its functions of classification, and such legislation can be condemned as vicious only when it is without any reasonable basis and therefore purely arbitrary; but when legislative classification is called in question if any state of facts can be reasonably conceived that would sustain the law the existence of that state of facts at the time it was enacted must be assumed. Mining is the one great industry of Alaska and is attended by many hazards and complexities and it is not strange that the legislature should make of the single industry a single classification for adjustment of workmen's compensation. Such a classification does not render the act unconstitutional, and the fact that "mining operations" include all work performed on or for the benefit of any mine or mining claim and may include persons but remotely connected with the working of mines is within the legislative discretion and can not affect the validity of the act.

Johston v. Connecott Copper Corp., 248 Fed. 407, p. 413.

WORKMEN'S COMPENSATION ACT OF ALASKA—VALIDITY—APPLICATION TO
MINORS.

The workmen's compensation act of Alaska is not invalid because it makes no provision respecting workmen under the age of majority for accepting or rejecting the provisions of the act. The legislature may have assumed that a minor having the capacity to contract or to be contracted with has the capacity to reject or waive the pro-

visions of the act. But minors are not denied the interposition of a guardian or next friend in doing the act for them.

Johnston v. Connecott Copper Corp., 248 Fed. 407, p. 414.

BENEFICIAL CONSTRUCTION ADOPTED.

In construing and applying the provisions of the Utah workmen's compensation act a court must keep in mind the purpose the legislature had in view in adopting the act. If the act is susceptible to two constructions, one of which in a large measure would make it useless and of no material benefit and the other construction would manifestly make it effective and beneficial and would subserve the public welfare, a court should adopt the latter construction if it can be done according to sound principles of law and rules of construction.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 306.

WORKMEN'S COMPENSATION ACT OF ALASKA—SUPERBURDEN ON MINER.

The fact that the workmen's compensation act of Alaska makes it more difficult for the workmen or miners to make their election to accept the provisions and to waive them when the election is once made than for the employer, and that it is burdensome for the miners to pay the expense pertaining to verification and recording, is only a minor inequality, if any, and is without the indicia of arbitrary discrimination.

Johnston v. Connecott Copper Co., 248 Federal 407, p. 414.

COMPULSORY CHARACTER OF ACT.

The workmen's compensation act of Utah (laws 1917, ch. 100) is compulsory in its provisions and a mining corporation may be required, by mandamus proceedings instituted in the supreme court by the industrial commission, to conform to and comply with an order of the industrial commission requiring it to furnish security to the satisfaction of the commission where the mining company elected to pay the compensation direct to its employees.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 306.

ELECTIVE FEATURE.

The provisions of the workmen's compensation act of Utah (laws 1913, ch. 100) can not be construed to be elective merely upon the part of a mining corporation if such a construction would practically nullify the provisions of the act, and where a different construction would render it effective.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 306.

WORKMEN'S COMPENSATION ACT OF ALASKA—INSURANCE—METHOD OF SECURING FUND.

The insurance feature of a workmen's compensation act is designed to afford an employee adequate security for his compensation, but in the workmen's compensation act of Alaska another scheme is evolved intended to accomplish the same purpose. The particular method for accomplishing the purpose is mainly one of legislative choice, and so long as a method selected is reasonably adapted for the purpose and is not arbitrary and without proper regard to cause and effect it is beyond the scope of judicial function to disturb the choice. The workmen's compensation act of Alaska of 1915 is reasonably adapted to secure to an employee the compensation provided for in the act and a court can not say that the legislation is arbitrary and not based upon sufficient reason for its adoption.

Johston v. Connecott Copper Corp., 248 Federal 407, p. 413.

SECURING COMPENSATION TO EMPLOYEES.

The workmen's compensation act of Utah provides that mine operators, as one class of employers, shall secure compensation to their employes either (1) by insuring payment of compensation in the State insurance fund, (2) by insuring with some company engaged in indemnity insurance, or (3) by proof of financial ability to pay compensation direct to their employees. But if a mine operator elects to pay direct without obtaining insurance, the industrial commission may nevertheless require security in the manner provided.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 304.

INJURY ARISING OUT OF EMPLOYMENT.

The death of a miner was caused by the bursting of the aorta, which was in a diseased condition. Where the death was not caused solely by the disease progressing naturally, but was due to the strain of the work concurring with the disease, then it may be said that the miner suffered an injury by an accident arising out of his employment, within the meaning of the Indiana workmen's compensation act.

Indian Creek Coal & Min. Co. v. Calvert (Indiana Appeals), 119 Northeastern 519, p. 521.

BASIS OF COMPENSATION—CHANGE FROM REGULAR TO TEMPORARY WORK.

Under the workmen's compensation act of Kansas an employee engaged for a specified employment at a fixed amount is entitled to compensation in case of injury, based upon the earnings of himself and

other persons in that grade of service, though the injury was received while he was working for less wages in a different grade to which he had been temporarily assigned for a short time by reason of a brief cessation of the work for which he was employed.

Bundy v. Petroleum Products Co. (Kansas), 172 Pacific 1020, p. 1021.

CLAIM FOR COMPENSATION—WHAT CONSTITUTES—FILING.

The workmen's compensation act of Michigan requires that a claim for compensation must be made within six months of the time of the injury. But a mere statement on the part of an injured miner to the effect "that I would have to make a claim for compensation if I didn't get along better," is not sufficient to constitute even an oral claim; and a subsequent written claim not made within six months can not be considered.

Basse v. Banner Coal Co. (Michigan), 167 Northwestern 954, p. 955.

DEATH DUE TO DISEASE—LIABILITY.

Where an employee afflicted with a disease received a personal injury under such circumstances as that he might have applied to the workmen's compensation act for relief on account of the injury if there had been no disease, but where the disease as it in fact existed was by the injury materially aggravated or accelerated resulting in disability or death earlier than would have otherwise occurred and the disability or death did not result from the disease alone progressing naturally, but the injury aggravating or accelerating its progress materially contributed to hasten its culmination in disability or death, then there may be an award under the workmen's compensation act of Indiana (Acts 1915, p. 392).

Indian Creek Coal & Min. Co. v. Calvert (Indiana Appeals), 119 Northwestern 519, p. 521.

PERSONAL INJURY.

A "personal injury," as the term is used in the Indiana workmen's compensation act (Acts 1915, p. 392), has reference not to some break in some part of the body or some wound thereon or the like but rather to the consequences or disability that results therefrom.

Indian Creek Coal & Min. Co. v. Calvert (Indiana Appeals), 119 Northwestern 519, p. 525.

ACCIDENT—MEANING.

The word "accident," as it occurs in the Indiana workmen's compensation act (Acts 1915, p. 392), is used in its popular sense and means any unlooked for mishap or untoward event not expected or

designed. The meaning assigned to the word as used in compensation acts must be distinguished from its meaning as used in accident insurance policies.

Indian Creek Coal & Min. Co. v. Calvert (Indiana Appeals), 119 Northeastern 519, p. 521.

EXTRAHAZARDOUS BUSINESS.

A retail coal dealer delivering coal with his own teams from his bins, or when out of coal at his yards, obtaining and delivering coal from local mines direct to his customers, is not engaged as a common carrier of persons or property or a private carrier for hire; and the business or occupation as a retail coal dealer does not come within any of the various businesses, enterprises, or occupations classified in the Illinois workmen's compensation act (Hurd's Rev. Stats. 1917, ch. 48, sec. 129) as extrahazardous.

Fruit v. Industrial Board, etc. (Illinois), 119 Northeastern 931, p. 932.

RETAIL COAL DEALER—CARRIAGE BY LAND.

A retail coal dealer hauling coal from his own bins to his customers and when out of coal at his coal yards sending his teams to the local mines and having his deliveries of coal made from the mines to his customers direct is not engaged in "carriage by land" within the meaning of the Illinois workmen's compensation act (Hurd's Rev. Stats. 1917, ch. 48, sec. 129), and a driver of one of the teams of such dealer injured while hauling material other than coal is not entitled to compensation under the workmen's compensation act, especially where neither the employer nor the injured employee had elected to be bound by the act.

Fruit v. Industrial Board, etc. (Illinois), 119 Northeastern 931, p. 932.

RETAIL COAL DEALER—ELECTION NOT TO COME UNDER ACT.

A retail coal dealer purchased coal by the car load and sold it by the ton both at his bins and by delivering to his customers. When out of coal he would send his teams to the local mines and have his deliveries of coal made direct from the mine to his customers. The dealer did other hauling with his teams. A driver of a team while engaged in hauling material other than coal was injured. The workmen's compensation act of Illinois (Hurd's Rev. Stats. 1917, ch. 48, sec. 128) does not apply because the injured employee was not engaged in any extrahazardous occupation within the meaning of section 3 of that act, and neither the employee nor the coal dealer had filed an election to be bound by the act.

Fruit v. Industrial Board, etc. (Illinois), 119 Northeastern 931, p. 932.

See Sugar Valley Coal Co. v. Drake (Indiana Appeals), 117 Northeastern 937, p. 938.

DEATH OF SON—DEPENDENCY—COST OF BOARD.

In case of the death of a son who had been contributing to the support of his father and mother, in estimating the amount to which the dependents were entitled under the workmen's compensation act of Michigan, where the son lived with the father and mother, the cost of the board and maintenance of the deceased son should be deducted from the amounts that the son contributed to the support of the dependents.

Engberd v. Victoria Copper Min. Co. (Michigan), 167 Northwestern 840, p. 841.

DEPENDENTS—CHANGE OF DEPENDENT'S WORK.

A minor 19 years of age and unmarried was killed while working in a mine in the course of his employment. His father and mother were dependents and claimed compensation under the workmen's compensation law. The proof showed that after the death of the minor the father, because of poor health, changed his work from underground at a wage of \$3.25 a day and did surface work at a wage of \$2.65 a day. The change of work or compensation by the father after the death of the son was immaterial. Questions as to who constitute dependents and the extent of their dependency are to be determined as of the date of the accident to the employee and their right to any death benefit becomes fixed at such time irrespective of any subsequent change of conditions.

Engberd v. Victoria Copper Min. Co. (Michigan), 167 Northwestern 840, p. 841.

ALLOWANCE FOR HOSPITAL CHARGES.

The Kansas workmen's compensation act (Gen. Stats. 1915, sec. 5906) provides that in fixing the amount of compensation in case of injury, allowances shall be made for any payment or benefit which the injured employe may receive from the employer during the period of incapacity, and authorizes an allowance for reasonable hospital charges necessarily incurred and paid by the employer.

Bundy v. Petroleum Products Co. (Kansas), 172 Pacific 1020, p. 1021.

INDUSTRIAL COMMISSION—AUTHORITY AND DISCRETION.

The workmen's compensation act of Utah (Laws 1917, ch. 100, sec. 53) gives a mining corporation, with other employers, the option to pay compensation direct to its employes, but to obtain this option it must furnish satisfactory proof to the industrial commission of its financial ability to do so. The power is conferred upon the industrial commission to decide whether or not a mining corporation that has

elected to pay the compensation direct to its employees is able to do so, and if the commission decides that it is not, it may order the corporation to secure the payment of the compensation as the statute provides, as in its discretion it may do. Under such circumstances insurance is not therefore forced upon the corporation "contrary to law," but the corporation is merely required to do what the law enjoins.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 306.

INDUSTRIAL COMMISSION MAY REQUIRE SECURITY.

A mining corporation made application to the industrial commission for the privilege of paying compensation to its employees direct and the privilege was granted upon the express condition that the mining company would file with the commission a surety bond or liquid collateral in a stated sum and a formal order to that effect was entered by the commission. Employers are given the right to elect whether they will insure the payment of compensation or furnish proof of their financial ability to make prompt payment; but the legislature intended that all employers shall in advance secure the payment of compensation to which any one of their employees may become entitled. This feature of the workmen's compensation act is compulsory and is valid and enforceable and is not repugnant to any constitutional provision.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 304.

INDUSTRIAL COMMISSION—MANDAMUS TO ENFORCE COMPLIANCE WITH STATUTE.

The workmen's compensation act of Utah imposes upon a mining corporation as upon other employers, the duty of complying with its provisions relating to the insuring of the payment of compensation provided for. The industrial commission is empowered to enforce obedience to these provisions and to enforce the payment of the compensation when it becomes payable in accordance with the terms of the statute; but no power is conferred upon the commission to sue to recover the amount employers are required to pay for insurance unless and until they have obligated themselves to pay. Where a mining corporation has elected to pay compensation direct to its employees but has refused to provide security for such payment, the only remedy the industrial commission has is to compel by mandamus the delinquent corporation to comply with the provisions of the statute relating to the insuring of the payment of the compensation provided by the statute. The fact that a mining corporation may be required to pay money for insurance without receiving anything

in return is not a defense to an action by the industrial commission to compel it to furnish the security required for the reason that such statutes result in the public welfare and individual employers receive benefits therefrom in that they are saved from the expense of litigation and the beneficial provisions are usually sufficient to induce an employer to avail himself of the provisions of the act.

Industrial Commission v. Daly Min. Co. (Utah), 172 Pacific 301, p. 305.

MINES AND MINING OPERATIONS.

RELATION OF MASTER AND SERVANT.

FAILURE TO PROVE RELATION.

In an action by a miner for damages for injuries received by the failure of a mine operator to furnish props, certain counts proceed on the theory of the existence of the relation of master and servant between the injured miner and the mine operator; but there can be no recovery on such counts where the undisputed evidence disclosed no such relation.

Clark v. Choctaw Min. Co. (Alabama), 78 Southern 372, p. 373.

ACTIONS—PLEADING AND PROOF OF NEGLIGENCE.

PLEADING NEGLIGENCE—SUFFICIENCY OF COMPLAINT.

A complaint in an action by an injured miner against a mine operator for damages for injuries is sufficient where it avers that the complainant was in the defendant's mine as a laborer employed by an independent contractor by and through whom the defendant was operating his mine; that as such laborer the plaintiff was being transported on a tram car operated by the defendant for the transportation of ore and laborers, and that the defendant so negligently conducted itself in and about transporting the plaintiff that the tram car was derailed and the plaintiff was thereby injured.

Sloss Sheffield Steel & Iron Co. v. Crosby (Alabama), 78 Southern 898.

A complaint or declaration is sufficient and states a cause of action against a mine owner where it avers that the plaintiff, a minor, a poor boy of tender years without experience or means of support other than his daily wages as a common laborer, was engaged with his father in digging and loading coal into mine cars to be hauled to the drift mouth and tippie for shipment; that such work was not inherently dangerous or beyond his ability to perform while working with his father; that the coal mine operator through its superintendent and other agents ordered, required and coerced the plaintiff to perform a different and more hazardous work, and that he was injured while so engaged in performing such extrahazardous work.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 581.

DEFENSE—INSUFFICIENT PLEA.

In an action by a miner for damages for injuries caused by a fall of rock from the roof of the mine a plea is insufficient that averred that the plaintiff was hurt while working under or near a rock or place in the roof not securely propped and that the plaintiff knew the danger thereof and was sent by the mine foreman to remedy the defect and that he continued negligently to work under or dangerously near the rock until it fell and injured him, as it does not aver that it was the plaintiff's duty to remedy the defect or that in compliance with the order he undertook that duty.

Choctaw Coal & Mining Co. v. Dodd (Alabama), 79 Southern 54.

A plea to a complaint in an action for damages for injuries sustained by the plaintiff by a fall of rock from the roof of an entry is insufficient where it failed to aver that an examination of the roof of the mine at the place of the injury would have disclosed the defect as well as the danger of going to work at the place in question.

Choctaw Coal & Mining Co. v. Dodd (Alabama), 79 Southern 54.

In an action by a miner for damages for injuries caused by a fall of rock from the roof a plea is insufficient which avers that the plaintiff was at the time he suffered the injuries complained of the agent of the mine operator and entrusted with the duty of seeing that the roof was in a proper condition and that the plaintiff undertook to perform such duties, is insufficient, as it is no more than a denial of the superintendence of the person entrusted with the superintendence of the mine, and a denial that such superintendent negligently ordered the plaintiff in the entry and in dangerous proximity to the rock which fell and caused his injury.

Choctaw Coal & Mining Co. v. Dodd (Alabama), 79 Southern 54.

STATUTE OF LIMITATIONS—ISSUES INCOMPLETE.

A boy 16 years of age was injured while working in a mine. Within the year after he became 21 years of age he brought an action against the mine operator for damages for the injuries sustained by him during minority. The mine operator pleaded the one year statute of limitations as a bar to the plaintiff's action. In such case the plaintiff must file a special replication, in order to make an issue on the special plea of the statute, as a judgment is erroneous if obtained without such issue; and it is essential in order to render admissible proof of the age of the complainant to remove the statutory bar.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, D. 584.

PROOF AND PRESUMPTION.

On the trial of an action by an injured miner for damages, the miner, as plaintiff caused to be subpoenaed as a witness a fellow miner who saw the accident and knew of the circumstances of the injury, but the witness was not called upon to testify on behalf of the plaintiff. On the failure of the plaintiff to call the witness the presumption arises that the witness if examined would not support the claim of the party upon whom the duty devolved to prove the facts of the injury.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 585.

See Producers' Coal Co. v. Mifflin Coal Co. (West Virginia), 95 Southeastern 949, p. 951.

PROOF OF INJURY—INFERENCE DRAWN FROM CIRCUMSTANCES.

It is one thing to say that the presumption of negligence arises from proof of injury, but it is a different matter to say that the jury may not in its consideration of the facts of a case reach the conclusion or draw the inference that an injury was occasioned by some happening which was not one of the ordinary risks of the employment and to conclude further that some negligent act of omission or commission caused the injury complained of.

Yellow Rose Min. Co. v. Strait (Arkansas), 202 Southwestern 691, p. 692.

PROOF AND PRESUMPTION—USE OF PROPER CARE.

Proof of the fact that the thing or instrumentality which caused an injury to an employee was under the management of a company producing commercial asphaltum from crude petroleum and that in the ordinary course of things the accident would not have happened if those having the management of the machinery and appliances had used proper care, is sufficient to justify a verdict in favor of an injured employee.

Hallawell v. Union Oil Co. (California Appeals), 173 Pacific 177, p. 180.

See Graves v. Union Oil Co. (California Appeals), 173 Pacific 618, p. 619.

PROOF—INSTRUCTIONS BY COURT.

In an action for damages for injuries to a miner the liability of the mine operator depended on whether the injuries complained of resulted from a fall of rock from the roof, and where the operator's defense was based on the claim that the injuries complained of were occasioned by the falling of material from the working face of the room and not from the roof, it was proper for the court to instruct the jury that in order to justify a verdict for the plaintiff he must

prove by a preponderance of evidence that the injuries complained of were sustained by a fall of rock from the roof of the room as a result of negligence upon the part of the defendant in failing to supply the plaintiff with timbers and that the failure to so supply the timbers was the proximate cause of the injuries.

Victor American Fuel Co. v. Melkusch (New Mexico), 173 Pacific 198, p. 199.

ACCIDENT AS PROOF OF NEGLIGENCE—RES IPSA LOQUITUR.

A collision of a truck or handcar used by a mine operator for carrying express matter to his mine and on which persons were permitted to ride, with a train on the track, is *prima facie* proof of negligence, and if unexplained is conclusive, and the rule is applied in the case of a train or car operated by a private carrier. A collision in either case is not one of those accidents which is liable to happen if proper care is observed and the doctrine or maxim *res ipsa loquitur* must be applied.

Hodge v. Sycamore Coal Co. (West Virginia), 95 Southeastern 808, p. 809.

TRIAL—INSTRUCTION REQUESTED BY COMPLAINANT.

On the trial of an action by a miner for damages for personal injuries occasioned by the alleged negligence of the mine operator, the complainant is only required to present an instruction which covers every element essential to be found in order to make a case for him and permits a recovery under such instruction; and he is not required to go beyond this and to present in his instruction the theory presented in the evidence of the defendant, the mine operator, which, if believed by the jury, would destroy the complainant's case.

Lawbaugh v. McDonnell Min. Co. (Missouri Appeals), 202 Southwestern 617, p. 619.

TRIAL—INSTRUCTION—THEORIES OF CASE.

In an action by a miner for damages for personal injuries it is sufficient if an instruction by the court to the jury trying the case does not include the defendant's theory, but merely puts the case to the jury on the evidence which the plaintiff relied upon for a recovery. Such an instruction does not necessarily exclude the consideration of other facts asserted by the defendant.

Lawbaugh v. McDonnell Min. Co. (Missouri Appeals), 202 Southwestern 617, p. 619.

TRIAL—INCOMPLETE INSTRUCTION—REFUSAL.

A miner brought an action against a mine operator for damages caused by the alleged negligence of the mine operator in the use of defective

condition of which caused the injury complained of. The mine operator defended the action on the theory that the injury was the result of an unforeseen accident. Under such circumstances the court was justified in refusing an instruction to the effect that if the jury believed from the evidence that the injury to the complainant was due to accident or mischance not reasonably to be foreseen then a verdict should be for the defendant, in view of the fact that the instruction requested failed to define the words "accident" and "mischance."

Lawbaugh v. McDonnell Min. Co. (Missouri Appeals), 202 Southwestern 617, p. 619.

FAILURE TO INSPECT APPLIANCE—QUESTION OF FACT.

Whether or not a mine operator was negligent in failing to inspect the bail of a tub used in hoisting earth in a mine shaft where the tub or bucket was purchased from a reputable dealer is a question of fact to be determined by the jury in an action by an employee for damages for injuries caused by the fall of a tub due to the defective condition of the bail.

Cole v. D. C. & E. Mining Co. (Missouri Appeals), 204 Southwestern 197, p. 200.

MINOR'S IGNORANCE OF DANGER—PLEADING EXCUSED—CHANGE OF WORK.

A complaint in an action by an inexperienced boy working in a coal mine is sufficient where it avers that the coal-mine operator by its superintendent and other managing agents required and coerced the boy to undertake a dangerous work, one for which he did not possess the capacity or experience to perform with safety and that his injury occurred while so performing such work. In such case it is not necessary to aver that the plaintiff obeyed the commands without knowledge of the danger, as the averment of coercion excused the averment of want of knowledge.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

NEGLIGENCE OF OPERATOR.

WHAT CONSTITUTES—USAGES OF BUSINESS.

The ground of liability under a charge of negligence is not danger but negligence, and the test of negligence in methods, machinery, and appliances is the ordinary usage of the business; and a usage of machinery and appliances that is inherently and necessarily dangerous and practically abandoned because of its danger may be suffi-

cient to establish negligence as against a usage that is general and comparatively free from danger.

Ramage v. Producers' & Refiners' Oil Co. (Pennsylvania), 103 Atlantic 336, p. 337.

DEATH OF MINER—CAUSE UNKNOWN.

There can be no recovery for the death of a miner due to his fall from a bucket or tub while being lowered into a mine on the ground of the alleged negligence of the mine operator caused by leaving timbers in the shaft in such position that the tub or bucket striking against one such timber thereby throwing the deceased out of the bucket, where the plaintiff's evidence left in doubt the question of whether the miner was killed by the fall from the bucket or whether he was struck and killed by the falling of a piece of timber from the top of the shaft and where there was no averment of any negligence in connection with the falling of the piece of timber. Where the evidence did not show whether or not the miner was struck by the timber or whether his death was due to the fall from the bucket and where the evidence failed to show that the fall was due to the bucket striking against the timbers in the shaft, there could be no recovery under the allegations of the complaint.

Kidd v. Coahuila Lead & Zinc Co. (Missouri Appeals), 204 Southwestern 284, p. 285.

DAMAGES BY FIRE—LIABILITY.

The generally recognized and practically admitted danger attending the use of what is known as the hot tube method of ignition in power used in pumping oils in immediate connection with the gaseous and dangerous fluid and the further fact of the occasional and exceptional use of such method, are proper matters for consideration in determining the question of the negligence of an operator in pumping oil by such method.

Ramage v. Producers' & Refiners' Oil Co. (Pennsylvania), 103 Atlantic 336, p. 337.

DAMAGES BY FIRE—PROOF OF NEGLIGENCE.

In an action by a property owner for damages for loss of property occasioned by a fire alleged to have been caused by the negligent operation of an oil pumping station, proof that the oil company operated its pump by the hot tube method of ignition, in connection with the conceded liability to the escape of oil and gas in and around the open flame used in the hot tube, might be sufficient for a reasonable inference by a jury for the origin of the fire, as the fact that

oil and gas coming in contact with the open flame would ordinarily produce an explosion and fire is so manifest as not to require proof.

Ramage v. Producers' & Refiners' Oil Co. (Pennsylvania), 103 Atlantic 336, p. 337.

DISCHARGE OF INFLAMMABLE FLUID INTO FURNACE FIRE.

It is negligence on the part of a manager or master mechanic of an oil company engaged in producing commercial asphaltum from crude petroleum to discharge the highly inflammable fluid in a way to come in contact with the intense furnace fires and to spread the fire quickly to the immediate vicinity of an open trap the surface of which carried more or less inflammable material and by reason of which an employee was burned to death.

Hallawell v. Union Oil Co. (California Appeals), 173 Pacific 177, p. 180.

See *Graves v. Union Oil Co. (California Appeals)*, 173 Pacific 618, p. 619.

OIL OPERATIONS—METHODS OF PUMPING.

In an action for damages caused by fire from an oil pumping station the evidence showed that 95 per cent of the pumping powers used throughout the particular oil producing territory were owned by a single transit company and the gas engines and powers used by it in pumping were operated by the magneto instead of the hot tube method by reason of its greater safety and the dangers attending the use of the latter method. Of the remaining 5 per cent of the pumping powers there was a very general use of the magneto for like reasons and because of its attendant dangers the occasional use only of the hot tube method, and such occasional uses were limited to times when the power was not being applied to the propulsion of oil through the lines or when light pressure only was required. These are proper matters for consideration in an action against an oil pumping company for damages caused by a fire that started from the burning oil.

Ramage v. Producers' & Refiners' Oil Co. (Pennsylvania), 103 Atlantic 336, p. 337.

DANGEROUS GRADE OF DYNAMITE.

A mine operator may be liable on the ground of negligence for furnishing a miner a higher and more sensitive grade of dynamite for blasting purposes than he had been accustomed to using and for furnishing him a higher and more sensitive grade than that which he requested, and by reason of the negligence in supplying the higher and more sensitive grade the miner while in the act of properly and carefully tamping the same was injured by an explosion.

Terleski v. Carr Coal Min. Etc. Co. (Kansas), 173 Pacific 8, p. 9.

THREATENED INJURY TO REAL ESTATE—NO RECOVERY FOR ANTICIPATED INJURY.

An iron mining company prepared its mine for operation by a system known as open-pit mining. The company stripped and removed the overlying earth and material, consisting of soft earth, quicksand and gravel and negligently deposited such material on ground that was low and spongy and that sloped toward the premises of the complainant and other residences in a village on the opposite side of a highway. By reason of the negligent manner of depositing and piling the material a large mass of the dump broke loose, flowed and moved across the street, caught and removed and injured the houses and buildings; but the residence of the complainant was not touched or damaged by the flow from the dump. The condition of the dump continued dangerous from its negligent construction and the complainant was apprehensive of injury to his residence and premises and by reason of the situation the market value of his premises was entirely taken away. Courts can not allow damages for depreciation in the market value of real estate, due to the apprehension of future injury by negligence for an act which has not and may never happen. Damages based upon mere apprehension of future injury to real property by an act yet to happen is too remote and speculative.

Johnson v. Rouchleau-Ray Iron Land Co. (Minnesota), 168 Northwestern 1.

LIABILITY FOR INJURY TO PERSONS RIDING ON CAR.

A person riding gratuitously on a truck or handcar maintained and operated by a coal mining company and used to haul its express matter over a spur track of a railroad company leading from the main line to its coal line with the consent of its general manager having control of the operations of such car, is not a trespasser or a mere licensee but is a passenger and the coal company owes him the duty to use reasonable care for his safety. Such person is entitled to the protection of a passenger although he has paid no fare.

Hodge v. Sycamore Coal Co. (West Virginia), 95 Southeastern 808, p. 809.

DIRECTING MINER TO WORK OUTSIDE OF EMPLOYMENT—FAILURE TO WARN.

A miner inexperienced in general mining operations directed by the superintendent to do work outside of that he is engaged to do, is not presumed to be aware of its peculiar risks, and if the mine operator or his superintendent does not fully explain the risks to the miner before putting him at such new work, he may assume that it

has no greater risks than those which attach to his regular work, either in the nature of the work itself or in the habits of fellow servants with whom it brings him into contact.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

INSTRUCTIONS AS TO NEGLIGENCE.

A miner working in a mine was injured by a truck falling upon him at the bottom of a raise due to the alleged negligence of the mine operator in failing to give the miner sufficient time to properly adjust a rope on the truck in order to raise it. The mine operator sought to show that the plaintiff was negligent in the manner in which he tied the rope and in not stepping out of the way of the truck when he knew it had not been securely tied. On the trial of the case it was not error for the court to instruct the jury to the effect that if they found certain facts to exist then such facts as a matter of law would constitute negligence and establish the defendant's liability.

Picino v. Utah-Apex Min. Co. (Utah), 173 Pacific 900.

DUTY OF OPERATOR TO FURNISH SAFE PLACE.

LIABILITY FOR FAILURE—INSTRUCTION AS TO DUTY.

In the trial of an action by a miner for damages for injuries caused by the alleged failure of a mine operator to furnish a miner a safe working place the court instructed the jury that it was the operator's duty to use ordinary care in furnishing a miner a reasonably safe place in which to work and to use ordinary care and prudence to prevent injury to the miner while engaged in such work, and a failure to discharge such duty constitutes negligence on the part of the mine operator and would permit the injured miner to recover damages by reason of any injuries resulting therefrom. Such an instruction is not erroneous on the ground that it excludes the doctrine of assumption of risk, where the court gave other instructions on the effect of the assumption of risk, and expressly told the jury that all instructions were to be considered as a whole.

Yellow Rose Min. Co. v. Strait (Arkansas), 202 Southwestern 691, p. 693.

DANGERS FROM FIRE—INSUFFICIENT MEANS OF ESCAPE.

A company engaged in producing commercial asphaltum from crude petroleum is liable for the death of an employee caused by fire, for failing to furnish the employee with a safe working place, where the oil-impregnated soot had been allowed to accumulate on the timbers and sides of the building and the room in which the

employee was required to work was crowded with barrels and material and no sufficient means of escape were provided, and the fire was carried rapidly to the employee's working place by reason of the oil-impregnated soot.

Hallawell v. Union Oil Co. (California Appeals), 173 Pacific 177, p. 181.

DUTY TO PROVIDE SAFE APPLIANCES.

DUTY TO FURNISH MATERIALS AND AGENCIES NEEDED FOR REMOVING DEFECTS.

Where danger exists in a mine it is the duty of the operator or of the mine foreman acting for him, to furnish an employee ordered to remedy the defect the materials, agencies, and facilities needful for the remedying or removal of the dangerous defect without unnecessarily imperiling the employee. This primary duty of the operator carries with it a proper and reasonable exercise of the superior judgment of the operator as to the materials and facilities needful and as to the reasonable safety with which the employee, charged with no duty to remedy the defect, may comply with the operator's orders to remedy the same. In such case the employer's default suspends the employee's duty to remedy the defect, though he be ordered to do so by the mine operator. A mine operator can not escape responsibility for his negligent order, or failure of duty, that unnecessarily exposed to peril the employee complying therewith or acting thereon when it was not the employee's primary duty to do the thing commanded and it was perfectly obvious to the employer that to comply with the command was dangerous.

Choctaw Coal & Mining Co. v. Dodd (Alabama), 79 Southern 54, p. 55.

PURCHASE FROM DEALER—HAZARDOUS USE—CARE REQUIRED.

The trend of recent authorities is away from the old rule that where a master purchased a standard appliance from a reputable dealer he has discharged his duty in the first instance. Regard should always be had for the character of the work and its hazards and no invariable just rule can be conceived or stated. In the purchase of simple tools and appliances to be used in nonhazardous occupations the master has met the requirements of ordinary care where he has supplied the servant with an instrument and appliance of a reputable dealer or manufacturer, but the modern tendency seems to be in favor of holding that the mere purchase of an instrument or appliance from a reputable dealer is not alone sufficient to excuse the employer where the appliance is to be used in a hazardous occupation such as a bucket for hoisting dirt in lots of three-quarters of a ton up a shaft over the heads of the employees.

Cole v. D. C. & E. Mining Co. (Missouri Appeals), 204 Southwestern 197, p. 199.

HOIST—DEFECTIVE CLUTCH BOLT.

Under the rule that it is the duty of a mine operator or employer to furnish his employees with safe appliances it was the duty of the mine operator to tighten the screw or clutch bolt for properly adjusting the clutch band to a drum so that the hoist for lowering and hoisting men in the mine could be safely operated. The failure to readjust the clutch bolt before attempting to use the hoist for miners descending into the shaft may be regarded as the proximate cause of the death of a miner caused by the too rapid descent of the bucket due to the defective condition of the screw or clutch bolt.

Consolidated Interstate-Callahan Min. Co. v. Witkouski, 249 Federal 833, p. 837.

REPAIRS—NONDELEGABLE DUTY.

It is the duty of an employer, including a coal mine operator, to furnish sufficient and safe materials, machinery, or other means by which service is to be performed and to keep them in repair and order. This duty can not be delegated to a servant or other person so as to exempt the employer from liability for injuries caused to another employee by its omission.

Consolidated Interstate-Callahan Min. Co. v. Witkouski, 249 Federal 833, p. 836.

DUTY TO INSPECT.**INSPECTION—QUESTION OF FACT.**

In an action by a miner for damages for injuries caused by the giving way of certain defective clamps alleged to be one of the efficient causes of the injury, the defective condition of which was due to the alleged failure of the mine operator to make proper inspection, it was for the jury to say whether under the facts the injury would have occurred had a reasonable inspection been made of the condition of the clamps.

Lawbaugh v. McDonnell Min. Co. (Missouri Appeals), 202 Southwestern 617, p. 619.

TUB FOR HOISTING—PURCHASE FROM DEALER—INSPECTION.

A mine operator in the construction of a shaft used iron tubs with iron bails for the purpose of raising the earth and materials in the mine shaft. The tubs were designed to hold 1,650 pounds of earth material. The operator purchased a new tub from a reputable dealer and the bail of the tub after some two months' use broke while being raised causing the tub to fall and injure a miner. The operator was not justified in relying on the safety of the tub and the bail because he purchased it from a reputable dealer, but he owed his employees

the duty of inspecting the tub and the bail where the tub was to be used in hazardous work like lifting large loads of earth material in the mine shaft over the heads of the employees.

Cole v. D. C. & E. Mining Co. (Missouri Appeals). 204 Southwestern 197, p. 199.

DUTY TO WARN OR INSTRUCT.

QUESTION OF FACT.

Whether an employee, either an adult or a minor, is within the classification which imposes upon a mine operator the duty and obligation to warn, usually is a question of fact for the jury to solve.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

CHANGE OF EMPLOYMENT—INCREASED DANGER.

Where an inexperienced boy working in a mine was ordered and required to perform new work more hazardous, and had not the capacity to discern, appreciate, and apprehend the increased peril, the duty devolved upon the mine operator to warn and instruct him, and failing to do so the operator must respond in damages for injuries sustained by the boy while engaged in the new employment.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

DELEGATION OF DUTY.

DUTY NONDELEGABLE—PRESENCE OF EMPLOYER.

Where a coal mine operator delegates to an agent or employee the performance of duties which the operator is legally bound to perform for the protection of his employees, the agent occupies the place of the employer by representation and the latter is deemed to be present and liable for the manner in which the duties are performed.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 581.

CHANGE OF EMPLOYMENT—DUTY NOT TO COERCE.

Where a superior employee has authority to change an inferior employee from one form of employment to another, the duty not to coerce is nondelegable and the delinquent superior servant will be held to be a vice principal. But the employer's nondelegable duties must be limited to those to whom he entrusts authority to change the employment of other servants.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 584.

OPERATOR'S ASSURANCE OF SAFETY.**WHAT CONSTITUTES ASSURANCE.**

A timberman appointed by a mine operator to do the propping in the mine for the miners was requested by a miner and directed by the assistant mine foreman to prop the roof where the miner was at work. In response he went to the working place of the miner for that purpose and after examining the roof and upon leaving the working place he said, "All right!" "So long." After the timberman left the roof fell and killed the miner. In an action for damages for the death evidence was introduced to show that the words "all right" mean, in mining parlance, that everything was all right. Considering the circumstances under which the language was used it was a question for the jury whether it amounted to an assurance of safety and if it was an assurance of safety the miner had the right to continue his work and the mine operator would be liable in damages for his death.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534, p. 536.

DANGER NOT OBVIOUS AND IMMINENT—RELIANCE BY MINER.

A miner was directed by the superintendent of a mine to work under an overhanging rock that appeared to be dangerous. The superintendent after testing the rock with a pick directed the miner to proceed with the work and assured him that it was "all right." In the absence of evidence tending to show that the danger was obvious and imminent the miner was justified in relying upon the superior judgment of the superintendent and upon his assurance that the place was safe.

Kolasky v. Delaware & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 723.

TIMBERMAN—ASSURANCE OF SAFETY.

A timberman to whom a coal mine operator has delegated the duty of propping is a vice principal and his assurance of safety to a miner is in effect an assurance by the mine operator. But it is not necessary that a mine operator or his timberman shall assure a miner in terms that the place is safe. It is sufficient if under the circumstances the acts and words of the mine operator, or his representative, are in effect an assurance of safety.

Borderland Coal Co. v. Kirk (Kentucky), 203 Southwestern 534, p. 536.

CONTRACTS RELATING TO OPERATIONS.**AGREEMENT TO OPERATE CONTINUOUSLY—BREACH—FORFEITURE.**

A contract for the operation of a mine contained a covenant to the effect that the contractee or his assignee would operate the mine continuously, keeping the machinery in as good working order as when

he took possession, less the natural wear and tear of the same, and on failure to operate the mine for 60 days without the written consent of the owner, the contract is to become null and void. The contractee did not operate the mine continuously and some five months after the date of the contract the mill used in operating the mine was destroyed by a flood and no effort was made on the part of the contractee to rebuild the mill, or to equip the mine with the necessary machinery to operate it. Neither the contractee nor his assignee was financially able to rebuild the mill, supply the machinery and operate the mine. In order to avoid a forfeiture of the contract the burden was on the contractee or his assignee to show that he intended to rebuild the mill and could have restored the status quo of the property within a reasonable time after its destruction by the flood and on failure so to do a forfeiture may be declared.

Bradley v. Holliman (Arkansas), 202 Southwestern 469, p. 471.

MODIFICATION AS A NEW CONTRACT.

The modification of a written agreement for a mining lease in so material a matter as fixing a different rate of rent or royalty is in effect the making of a new contract.

Last Chance Min. Co. v. Tuckahoe Min. Co. (Missouri Appeals), 202 Southwestern 287, p. 288.

MODIFICATION OF CONTRACT—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE.

The parties to a written contract and agreement providing for the execution of a mining lease for certain mineral lands, subsequently made a verbal modification fixing a different rate of rent or royalty to be stated in the lease when executed. When a contract is one that must be in writing in order to be valid under the statute of frauds then a modification of the contract must be also evidenced by writing or it is void, and specific performance can not be enforced of such a contract with the oral modification.

Last Chance Min. Co. v. Tuckahoe Min. Co. (Missouri Appeals), 202 Southwestern 287, p. 288.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE.

A contract for mining operations provided for the payment of royalty at 20 per cent of the proceeds of the operations. Conditions were encountered that rendered the operations unprofitable on the basis of the royalty named and mining operations could not be continued without additional investment and the contractee proposed to cease operations and abandon the contract. The contractor's

tenure of the land depended upon the continuation of the mining operations. It was thereupon orally agreed to change the royalty from 20 to 15 per cent, and under this modification the contractee continued to mine, sunk shafts to lower levels, drained the land, and thereby discovered and opened up a rich run of ore which was mined for more than six months and the contractor accepted royalty at the modified price of 15 per cent. This was such part performance as to take the contract out of the statute of frauds and permit its specific enforcement by the contractee.

Last Chance Min. Co. v. Tuckahoe Min. Co. (Missouri Appeals), 202 Southwestern 287, p. 289.

METHOD OF OPERATING.

OBSTRUCTION OF HIGHWAY—RIGHT OF INDIVIDUAL TO SUE.

A company operating a zinc mining plant permitted a discharge of water therefrom which contained a murky sediment called "sludge," and which was emptied into a small, dry branch that crossed a private road used by certain landowners and which afforded them a way to the public road. The water containing the sludge was caused to run over and upon complainant's field and near to and into a spring house and into a pond on the complainant's land used for watering stock. In times of high water or floods the sludge would wash down upon the complainant's land, thereby injuring the land, contaminating the spring and stock pond, to the annoyance and damage of the complainant. Under such facts the complainant had the right to maintain an action for damages and to have the nuisance abated not only with reference to his private property but also with reference to the highway as interfering with the ingress and egress, and for the further reason that the highway was shown to be a private way.

Dickensheet v. Chateau Min. Co. (Missouri Appeals), 202 Southwestern 624, p. 625.

THREATENED INJURY TO ADJOINING PREMISES—RECOVERY.

An iron company prepared its mine for operation by the system known as open pit mining. In conducting the operation it removed or stripped the dirt and surface above the minerals and placed these in a large dump and pile on adjoining land and near to the real estate and residence of the complainant. Subsequently a large mass of soft, wet, mortarlike material gushed from the bottom of the dump, swept across a highway down a village street, carrying with it several houses. The complainant's residence was not touched or injured by this flowing mass, but by reason of the negligent manner in which the dump was constructed another slide occurred as when

happen at any time and would strike and injure his property, and that as the result of such apprehension the market value of his property had been greatly diminished. The owner of real estate can not recover damages for mere apprehension of injury, but he must wait until the injury or damage has actually happened. It is the damage, and not the anticipation thereof, that gives rise to the cause of action.

Johnson v. Rouchleau-Ray Iron Land Co. (Minnesota), 168 Northwestern 1.

MINE FOREMAN, VICE PRINCIPAL, SUPERINTENDENT—RELATION AND NEGLIGENCE.

PROOF OF RELATION—QUESTION OF FACT.

The fact that an employee in a mine had authority to hire and discharge men and direct the manner in which the entry should be driven and the mine developed was not inconsistent with his position as mine foreman nor was the fact that he was called superintendent sufficient to make him one. Where the evidence showed that such employee had full charge of a mine and the breakers of a colliery and that he had been known as superintendent of the mine, and where many of his duties and powers were consistent with those of a superintendent, the question of his relation as superintendent or foreman became one of fact to be determined by a jury.

Kolalsky v. Delaware & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 722.

SUPERIOR SERVANT—RELATION.

Whether a superior servant other than the superintendent or general manager is a vice principal depends upon the nature of his negligent act and not upon his grade or rank.

Kinder v. Boomer Coal & Coke Co. (West Virginia). 95 Southeastern 580, p. 584.

WHAT CONSTITUTES—VICE PRINCIPAL.

An employee of superior rank with authority to control and by whose negligent acts or orders injury to a servant of a lower grade is caused, is, as to such injured servant, a vice principal and not a fellow servant and his negligence is that of the employer.

Kinder v. Boomer Coal & Coke Co. (West Virginia). 95 Southeastern 580, p. 582.

WHAT CONSTITUTES—AUTHORITY TO EMPLOY AND DISCHARGE.

Mere authority to employ and discharge workmen is not of itself sufficient to constitute one employee a vice principal, as power to control the inferior servant in addition to superiority of rank is essen-

tial and when these two elements are present the superior is regarded as directly representing the master and his negligence in giving orders and directions is that of the master and not that of a mere fellow servant.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 583.

MINE FOREMAN AS AGENT OF OPERATOR—PROOF.

The authority of a mine foreman to represent the mine operator must be proven either by express authority given or by open, apparent, and notorious acts and conduct on the part of the mine foreman; but proof of one or two isolated instances thereof is not sufficient to establish such authority of the mine foreman and to render the mine operator liable in damages for injuries due to the negligence of the mine foreman in the discharge of his statutory duties.

Strother v. United States Coal & Coke Co. (West Virginia), 95 Southeastern 806.

DIFFERENCE IN RANK—LIABILITY OF MINE OPERATOR.

To render a mine operator liable for the consequences of a negligent act or omission to act of one servant where injury ensues therefrom to another servant of the operator in a common employment, the act or omission must be in respect to some duty incumbent upon the mine operator himself, some nondelegable duty. If a mine operator delegates to another the performance of nonassignable duties, thus making him a representative of the employer, the latter must respond for the results of the negligence of the former.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 583.

NEGLIGENCE OF VICE PRINCIPAL—LIABILITY OF OPERATOR.

An attempt on the part of a mine operator to delegate to a person in any rank or employment the duty of furnishing employees sufficient and safe materials, machinery, or other means by which the services are to be performed has the effect to make such person a vice principal. Such person discharges the employer's services and can not be reckoned as a fellow servant with a common employee.

Consolidated Interstate-Callahan Min. Co. v. Witkouski, 249 Federal 833, p. 836.

CHANGE OF WORK—INCREASED HAZARD—LIABILITY OF OPERATOR.

A coal-mine operator is liable for the negligence of his superintendent who ordered and coerced an inexperienced boy to leave the work he was employed to perform and go to a distant part of the mine and perform more hazardous work, work of which he did not possess the capacity to appreciate the increased risk, and where the

superintendent failed to warn the boy of the risks of the new employment and gave no instructions as to the method of performing the work.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

SERVANT EXCEEDING AUTHORITY—COERCING MINOR EMPLOYEE.

Where a foreman of mine drivers exceeded the authority conferred upon him by the mine operator and coerced a minor employee engaged at work in a different department, loading coal, to undertake the task of driving, a more dangerous and hazardous form of employment, and injury results to the minor in the latter employment, the foreman is, nevertheless, only a fellow servant, unless his negligence relates to some nondelegable duty which the employer owed to the injured employee.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 583.

FELLOW SERVANTS—RELATION—NEGLIGENCE.

WHO ARE—TEST.

The test as to whether one servant is a fellow servant of another is not the particular rank he sustains to that of others in the service, but the specific character of the act performed. If the act is one done in the discharge of some positive duty of the master to the servant then the negligence of the servant in the act is the negligence of the employer.

Consolidated Interstate-Callahan Min. Co. v. Witkouski, 249 Federal 833, p. 836.

Under the law as held and applied in Kentucky a miner pushing a car of dirt and refuse out of a mine to a dumping place, is not a fellow servant of other employees engaged in pushing other cars loaded with like material on the same track, and there may be a recovery against the mine operator for injuries occasioned by a car being pushed upon and over the miner engaged in pushing another car.

Elkhorn Min. Corp. v. Paradise (Kentucky), 203 Southwestern 291.

Two miners were engaged in tramping ore and the loaded cars for a part of the distance ran down a steep grade. One of the miners after having ridden the car several times insisted that the other miner ride a particular car. He did so without any direction or assurance of safety from the mine operator, with knowledge of the condition of the car and the track and of the danger in so doing. The sugges-

tion of the fellow miner was not binding upon the mine operator nor could it fix any responsibility upon him for the resulting injury to the miner who chose to act upon the suggestion of his fellow miner.

Ditley v. Primos Chemical Co. (Colorado), 171 Pacific 1146, p. 1147.

NEGLIGENCE OF FELLOW SERVANT.

In an action by a miner for damages for injuries caused by the fall of a heavy iron bucket used by the mine operator on his cars carrying ore to the tippie, an instruction by the court was not erroneous where it stated that if the mine operator negligently let fall a large can upon the complainant and that by reason thereof he was injured, that the carelessness, negligence, or recklessness on the part of any of the employes would be the negligence of the mine operator in respect to the acts charged. The instruction does not eliminate from the consideration of the jury the questions of assumption of risk and contributory negligence, but it merely states a condition under which a finding of negligence could be made against the mine operator.

Yellow Rose Min. Co. v. Strait (Arkansas), 202 Southwestern 691, p. 693.

NEGLIGENCE OF COEMPLOYEES—RECOVERY—PLEADING.

A miner while pushing a loaded car was injured by reason of another car being pushed against and upon him. In an action against the operator for damages for the injuries he alleged that the injury was occasioned by the negligence of the employer in failing to provide a safe working place in that the track over which the cars were pushed was defective and unsafe. Under such a complaint he can not recover where the proof showed that the injuries complained of were caused by the negligence of other employees, not fellow servants, in pushing another car against and upon him causing the injuries complained of.

Elkhorn Min. Corp. v. Paradise (Kentucky), 203 Southwestern 291.

MINER'S WORKING PLACE—SAFE PLACE.

INCREASED DANGER FROM DYNAMITE.

A miner was accustomed to use 40 per cent dynamite and knew how much force could be used in tamping the 40 per cent grade. He requested the mine operator's storekeeper to furnish him 40 per cent dynamite, but instead thereof and without any mark to indicate and without knowledge on his part the storekeeper furnished him 60 per cent dynamite, a higher and more sensitive grade and one that would explode with much less force and with the use of which the miner was not familiar. The miner without knowledge of the

increased danger placed the higher and more sensitive grade in a drill hole prepared for it and while tamping it lightly with a broom stock, the dynamite, by reason of the sensitive grade, exploded and caused the injury complained of. Under such circumstances he can not be charged with a failure to keep his working place safe.

Terleski v. Carr Coal Min. etc. Co. (Kansas), 173 Pacific 8, p. 9.

CONTRIBUTORY NEGLIGENCE OF MINER.

EFFECT ON RECOVERY.

Under the rule as established in the State of Arkansas, the fact that a miner was guilty of negligence contributing to an injury only reduces the amount of the recovery proportionately and will not necessarily defeat an action for personal injuries.

Yellow Rose Min. Co. v. Strait (Arkansas), 202 Southwestern 691, p. 693.

CHOICE OF TWO METHODS—DUTY.

Where a miner has the choice of two methods of performing his work, one safe and the other dangerous, and he is aware of this fact, it is his duty to choose the safe method, but if he chooses the method which necessarily exposes him to danger and which would have been avoided had he chose the other and he is injured, he can not recover.

Dilley v. Primos Chemical Co. (Colorado), 171 Pacific 1146, p. 1147.

MINER SELECTING DANGEROUS METHOD.

A miner whose duty it was to push loaded cars of ore from the mine to the dumping place and who instead of pushing or following the loaded car got upon the car to ride down a steep grade and who by reason of the velocity attained by the car was injured by reason of selecting the dangerous method of tramming the ore, was guilty of such contributory negligence as would prevent a recovery.

Dilley v. Primos Chemical Co. (Colorado), 171 Pacific 1146, p. 1147.

INSTINCT OF SELF-PRESERVATION.

The instinct of self-preservation is sufficient to overcome the imputation of contributory negligence where an employee of a company, producing asphaltum from crude petroleum, was burned to death by reason of the negligence of the master mechanic of the oil company, and where the remains of the employee were found some distance from his working place, thereby indicating an effort on his part to escape.

Hallawell v. Union Oil Co. (California Appeals), 173 Pacific 177, p. 181.

See Graves v. Union Oil Co. (California Appeals), 173 Pacific 618, p. 619.

EMPLOYEE DOING WHAT HE WAS EXPECTED TO DO.

An employee in a mine was riding at the time of his injury on a trip or train of cars known in the parlance of the mine as the "slow drag," which was run by the operator for the purpose of carrying the employees out of the mine. Under such circumstances an injured employee can not be convicted of contributory negligence by reason of the fact that he did what he was expected to, where it appeared that the trip was run for the use and convenience of employees in the situation of the plaintiff.

Sloss-Sheffield Steel & Iron Co. v. Crosby (Alabama), 78 Southern 898.

RIDING ON TRAM CAR WITHOUT BRAKES.

A miner of several years' experience and of usual intelligence was with another workman engaged in tramming ore. The two miners conducted the loaded car from the breast of the tunnel to the ore bin by pushing. The car as the men knew had no brakes and a part of the way it passed down a steep grade. The miner without any direction from the mine operator and with knowledge that the car had no brakes and of the steep grade in the track voluntarily got upon the car, rode down the grade, and by reason of the velocity of the car was thrown off and injured. The negligence of the miner directly contributed to his injury and in the absence of any negligence on the part of the operator, he can not recover.

Dilley v. Primos Chemical Co. (Colorado), 171 Pacific 1146, p. 1147.

TRIP DRIVER—INJURY.

A mule driver hauling a trip of loaded cars out of a mine is guilty of such contributory negligence as will prevent a recovery for injuries, who while standing on the front of his car with his back to the side of the entry or tunnel and intending to step off at a room neck or entry to get and put into his trip a loaded car, but who without looking or making any effort to ascertain the proper place for alighting from his trip stepped off the car backward after it had passed the room neck and struck a rib or side of the entry and was then caught by the car and injured.

Maize v. Big Creek Coal Co. (Missouri Appeals), 203 Southwestern 633, p. 634.

INJURY FROM DYNAMITE—USE OF HIGH GRADE EXPLOSIVES.

A miner's action for damages for injuries caused by a premature explosion of dynamite used by him in his mining operations is not to be defeated on the ground of contributory negligence, where

the miner had been accustomed to use and was familiar with a 40 per cent grade of dynamite but the operator furnished and delivered to him a higher and more sensitive grade of dynamite without his knowledge and without any knowledge on his part of its being the higher or more sensitive grade and without knowledge on his part that the dynamite furnished would explode with a less degree of force used in tamping it and where the tamping was proper for the grade of dynamite the miner believed he was using.

Terleski v. Carr Coal Min. etc. Co. (Kansas), 173 Pacific 8, p. 9.

DRIVER JUMPING FROM TRIP.

* A trip driver was riding between the front of his car and the mule. It was his duty to step off the car, enter each of the rooms and get the loaded cars of coal therein, push them out to the main track and hitch them into the trip. At the time of the injury complained of he intended to let his trip pass the room neck and push the loaded car out of the room and attach it to the rear of the trip. To this end he attempted to step off the car in the room neck as the trip passed, but without looking, his face being in the opposite direction, he stepped off backward but did not step off into the room neck but stepped off after he had passed the room neck, his shoulders striking a hump or ridge in the side of the entry causing him to stagger forward, the car striking and crushing him against the side of the entry. Under the circumstances as disclosed by the proof, the driver was guilty of contributory negligence as a matter of law and was not entitled to recover for the injuries sustained.

Maize v. Big Creek Coal Co. (Missouri Appeals), 203 Southwestern 633, p. 634.

FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

USE OF NEW ENTRY.

An old entry in a mine used by the miners going to and from their work became flooded and was partially unfit for use by the miners. The mine operator was engaged in the construction of a new entry, which at the time of the injury complained of, was not entirely completed, but had been opened sufficiently for the miners to pass through, and a miner while passing through the new entry was injured by a fall of slate from the roof. Under such conditions, the miner could not be charged with such contributory negligence as would defeat his action for damages.

Cossette v. Paulton Coal Min. Co. (Pennsylvania), 103 Atlantic 346, p. 347.

MINER ACTING UNDER SUDDEN IMPULSE.

A miner had complained to the mine superintendent of an apparently dangerous rock projecting on one side of an entry. The superintendent, after testing it, assured the miner that it was safe and directed him to proceed with the work. On the opposite side of the entry there was a wire carrying an electric current into the mine used as a motive power for the mine cars. The miner, seeking to avoid a rapidly approaching car, stepped to the side of the entry under the rock and was injured by the fall of the rock. He considered the opposite side of the entry dangerous and required as he was to act in an emergency, he can not be held responsible for an error in judgment or charged with contributory negligence.

Kolalsky v. Delaware & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 723.

RIDING ON UNGUARDED TRUCK.

A person permitted to ride gratuitously on a truck or handcar and injured by reason of a collision of the handcar with a train on the tracks is not guilty of negligence in riding on the truck because it is unprovided with seats or rails when it appears that the collision of the truck with the train of cars was the only proximate cause of his injury.

Hodge v. Sycamore Coal Co. (West Virginia), 95 Southeastern 808, p. 810.

ASSUMPTION OF RISK.

RISKS ASSUMED.

DANGEROUS METHOD OF UNLOADING COAL.

The ore from the operation of a mine was hauled in large iron cans on cars run by gravity from the mine to the tippie, striking the tippie with sufficient force to throw the cans over and empty the ore into the tippie. The empty can was replaced on the car and the car pushed back to the mine by an employee engaged in that particular duty. The employee knew of the dangerous method of taking the ore to the tippie and of emptying the can and the danger from the falling ore and the risk of injury from this method of unloading was assumed by him as one of the risks of the employment. But this assumption of risk did not extend to a danger in no wise connected with the method of unloading and that was wholly unknown to him.

Yellow Rose Min. Co. v. Strait (Arkansas), 202 Southwestern 691, p. 692.

CHANGE OF EMPLOYMENT—KNOWLEDGE OF DANGER.

An employee in a mine, either adult or minor, who is transferred by the mine superintendent to a new branch of employment, and who

accepts the change voluntarily with full knowledge of its dangerous character, is regarded as assuming the risks ordinarily incident thereto.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

PERSON RIDING ON COAL CAR.

A person riding on a truck or hand car used by a mining company to haul its express matter to its mine and not designed for carrying passengers assumes only such risks as are incident to the particular mode of conveyance.

Hodge v. Sycamore Coal Co. (West Virginia), 95 Southeastern 808, p. 809.

RISKS NOT ASSUMED.

INJURY FROM INSECURE COAL BUCKETS.

In mining operations carried on by a mine operator the ore was carried on cars in large 200-pound metal cans, and iron bars were placed in and across the tipple in such position as to keep the cans from falling through when dumped into it from the cars. The loaded cars on which the cans sat were run to the tipple by gravity but the cars with the empty cans were pushed back by an employee. The method of emptying the loaded cans was dangerous and the danger was known to the employee whose duty it was to run the cars back with the empty cans, but the employee did not assume the risk of the danger of an empty can falling upon him after it was placed on a car by reason of an insecure method of holding the can on the car or by reason of the failure of an employee to properly place the empty can on the car.

Yellow Rose Min. Co. v. Strait (Arkansas), 202 Southwestern 691, p. 692.

DEFECTIVE MACHINERY AND APPLIANCES.

An employee in a mine does not undertake to incur the risks attendant upon the use of defective machinery or other instruments with which to do his work unless reasonable care and precaution has been exercised by the mine operator in supplying such as are safe for the purpose and use to which they are adapted.

Consolidated Interstate-Callahan Min. Co. v. Witkouski, 249 Federal 833, p. 836.

SUPERINTENDENT'S ASSURANCE OF SAFETY.

A miner was directed to make an excavation under or near an overhanging rock that appeared dangerous. He was assured by the mine superintendent, after a test, that the rock was safe. Subse-

quently props were promised and the miner ceased work until the props should be set. Later on returning to see if the props had been set and while inspecting the place he stepped under the rock in order to avoid a passing car. The danger the miner feared was the fall of the rock as a result of working around or near it, but he had no reason to anticipate the rock would fall in the absence of a disturbance of the surrounding coal and he had been assured by the superintendent that there was no danger. In the absence of evidence tending to show that the danger was obvious and imminent he was justified in relying upon the superior judgment of the superintendent and can not be charged with the assumption of the risk of danger.

Kolalsky v. Delaware & Hudson Co. (Pennsylvania), 103 Atlantic 721, p. 723.

COERCION BY SUPERINTENDENT.

The doctrine of assumption of risks rests upon voluntary action and if there is coercion by an agent representing the master and acting in his behalf and upon his authority, express or implied, the law does not regard the servant as assuming the risk.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 583.

COERCION—FEAR OF DISMISSAL.

Ordinarily the fear of dismissal or loss of position is not such coercion as will prevent the application of the doctrine of assumption of risk, where the dangers of the work are apparent and known to the plaintiff. However this may be, when the threat is against an adult employee, but when the employee is a minor rendering obedience to a superior servant, great allowance should be made in his favor with respect to the voluntariness of the assumption of the risks and if coercion is used the risks will not be assumed. Coercion will be more readily inferred in case of a minor than in the case of an adult under similar circumstances.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 583.

CHANGE OF EMPLOYMENT.

A miner who is directed by a mine superintendent to change his employment and to engage in different work in another part of the mine is not presumed to have knowledge of the dangers or the peculiar risks of the new employment and may assume that it has no greater risks than those which attach to his regular work.

Kinder v. Boomer Coal & Coke Co. (West Virginia), 95 Southeastern 580, p. 582.

PROXIMATE CAUSE OF INJURY.**PROXIMATE CAUSE—PROOF.**

In an action for damages for the death of an employee of a company producing commercial asphaltum from crude petroleum, the plaintiff is not required to show with absolute certainty that a fire negligently started was communicated to the asphaltum shaft and was the proximate cause of the injuries and death complained of; but it was sufficient to show that the burning oil was in close proximity to a trap; that the smoke and flames noticeably rose 2 or 3 feet from the ground; that the smoke contained more or less inflammable gases which might readily be communicated to the gases arising from the trap or the oil on it by the eddying currents of a strong wind, and that the fire burst forth almost simultaneously at the asphaltum shaft where there had been no fire from any other source.

Hallawell v. Union Oil Co. (California Appeals), 173 Pacific 177, p. 180.

See Graves v. Union Oil Co. (California Appeals), 173 Pacific 618, p. 619.

CONTRACTS RELATING TO OPERATIONS.**WRONGFUL DISCHARGE OF SUPERINTENDENT—LIABILITY.**

The wrong doing or delinquency of a superintendent of a mine which justifies his discharge by the mine operator in violation of a contract of employment must have some relation to the duties imposed by the contract. The test is, when taking the nature of the employment into account, do the acts complained of render the superintendent unfit to perform the duties which he had undertaken.

Burch v. Conklin (Missouri Appeals), 204 Southwestern 47, p. 50.

See Consumers' Lignite Co. v. James (Texas Civil Appeals), 204 Southwestern 719.

INDEPENDENT CONTRACTOR.**INJURY—LIABILITY OF MINE OPERATOR.**

An independent contractor mining coal as such and prior to the injury complained of was working and driving a place in the coal and in doing the work he hired the laborers and paid them out of his own money and the mine operator paid him for shooting it down by the ton. The defect causing the injury and for which he sued for damages was not such that arose from or had not been discovered or remedied owing to the negligence of the mine operator; but was in fact caused by the complainant himself at a time when he was working as an independent contractor and the defect could not have been discovered by an examination made by an expert and competent miner, at least not until shortly before the accident on account of the coal and rock that had been shot down by the complainant himself prior to the accident.

Red Eagle Coal Co. v. Thrasher (Alabama), 78 Southern 718, p. 719.

GENERAL INSTRUCTIONS—INDEPENDENT CONTRACTOR.

An independent contractor mining out coal in a mine, was given general instructions to "go to work on that side track and put up timber." A general instruction to a person who was undertaking to do a piece of work involving judgment, care, and skill to make it conform to the requirements for the safe operation of a mine, is a far different thing from ordering a dependent servant to do a particular act of service. A mine owner can not be held liable in damages for injuries to an independent contractor by a fall of rock from the roof where the contractor himself was an experienced miner and had sounded and examined the roof and thought it was safe to work under, and where, until shortly before the accident, nothing would have been discovered indicative of loose rock or specific danger therefrom.

Red Eagle Coal Co. v. Thrasher (Alabama), 78 Southern 718, p. 719.

RIGHT TO SURFACE SUPPORT.

RIGHT TO MINE SERVIENT TO SURFACE OWNERSHIP.

The right to mine is servient to the right of the owner of the surface to have it perpetually sustained in its natural state.

Faught v. Leth (Alabama), 78 Southern 830, p. 831.

INJUNCTION—DISSOLUTION.

A court on appeal will not disturb the finding of a trial court on the dissolution of a temporary injunction heard on affidavits and where the trial judge in person inspected the mining operations and on the affidavits and such personal inspection determined that the temporary injunction theretofore granted at the suit of the surface owner against the mining operations should be dissolved.

Faught v. Leth (Alabama), 78 Southern 830, p. 831.

NUISANCE.

MINE REFUSE—POLLUTION OF WATERS.

It is a nuisance justifying a recovery of damages for a company operating a lead and zinc mining plant to permit the mine refuse, a murky sediment, to run from its mining plant over the fields of an adjoining landowner, into a spring house and stock pond on his land, and over and upon a private road used by the landowner, to the injury of his land and to his annoyance and discomfort in polluting the waters of his spring and stock pond and in obstructing the private way used by him for ingress and egress to his premises.

Dickensheet v. Chateau Min. Co. (Missouri Appeals), 202 Southwestern 624, p. 625.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

CONSTRUCTION—MATURITY OF DEFERRED PAYMENT.

A lease or conveyance of minerals bound the grantee to pay the sum of \$300 within six months after quarrying or mining should be begun on the premises, the lease stating: "The unpaid \$300 is payable at any time second party sees fit to begin work on said land to remove stone." The grantee transferred his right to a stone company and the stone company began quarrying and removing stone from the premises. Whether the lease gave the company this right is not the question, but it does provide for the payment of the \$300 upon that contingency.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

CONSTRUCTION—COMPROMISE AND SETTLEMENT—CONSIDERATION FOR DRILLING.

An oil company entered into a contract with an oil-well driller in settlement of an existing liability and agreed to pay the driller \$3,000 if a well proposed to be drilled upon leased lands held by the oil company proved to be a commercially paying oil or gas well. Shortly after the execution of the contract, the oil company sold the lease on which the well was to be drilled and the purchaser, the assignee of the lease, thereupon developed a commercially paying gas well upon the leased land. Under the contract and according to its terms the oil company on the completion of the well became liable to the driller for the payment of the \$3,000.

Gem Oil Co. v. Callendar (Oklahoma), 173 Pacific 820, p. 823.

FAILURE OF LESSEE TO OPERATE—FORFEITURE.

A mining lease obligated the lessee to operate the mine continuously, "keeping the machinery in as good working order as when he takes possession 10 days hence, less the natural wear and tear of same." The lease also provided that on the failure of the lessee or his assignees to operate the mine for 60 days without the written consent of the lessor, the lease should become null and void. The lessee did not operate the mine continuously and about five months

after the execution of the lease the mill and machinery used in operating the mine were destroyed by an unusual flood. Some two months after the property was destroyed the lessee assigned the lease and his assignee made some effort to operate the mine, but did nothing toward rebuilding the mill. Under a covenant to repair, a lessee's liability is not confined to cases of ordinary and gradual decay, but extends to accidental injuries to the property, and if the improvements are entirely destroyed, the assignee is bound to repair within a reasonable time. The failure of the lessee or his assignee to rebuild the mill and to operate the mine according to the terms of the lease gave the lessor the right to treat the lease as canceled and to take possession of the property.

Bradley v. Holliman (Arkansas), 202 Southwestern 469, p. 471.

DIAMOND LEASE—CONTINUOUS OPERATIONS.

A mining lease recited that the lessor desired to have the property developed and worked as a diamond mine; that the lessee was a practical mining engineer with experience in testing deposits of Kimberlite or diamond-bearing dirt, and that he was associated with men of large means who had become interested in developing the mine. The lease provided that the lessee would diligently and faithfully prosecute the work as outlined in a scientific and practical manner and would commence operations within 30 days and would erect and install a modern washing and concentration plant of African type within one year and would treat and wash for the recovery and extraction of diamonds and other precious metals a minimum of 10,000 loads of material annually from the land described and as much more as could be reasonably done. The lease provided that the lessee should in no event cease work for a longer period than three months unless a necessity therefor should arise from contingencies beyond the control of the lessee or from physical or other conditions, not the fault of the lessee; but this clause was not to release the lessee from washing and treating for diamonds the 10,000 loads of dirt every year. One year later the lessor instituted proceedings to cancel the lease on the ground of fraud in its procurement, but on the final hearing the complaint was dismissed for want of equity. A year later another suit was instituted by the lessor to recover possession of diamonds which had been mined from the land, the complaint alleging in addition that the lease had been procured with the fraudulent intention of not complying with it. On the trial a jury found that the lease was not entered into with a fraudulent purpose and that the lessee had not failed to comply with the terms of the lease and judgment was entered in favor of the lessee. Each of these cases constituted an adjudication of the question of fraud in the execution

of the lease and also to the effect that the lease had not been broken by the lessee, and in a subsequent action by the heirs of the lessor the right of action on these questions extended no further than the last of the adjudications, and if any recovery could be had it must be for a breach of the terms of the lease subsequent to the date of the last action.

Mauney v. Millar (Arkansas), 203 Southwestern 10, p. 11.

LEASE TO MINE DIAMONDS—DILIGENCE IN DEVELOPING.

By the terms of a lease to mine diamonds, the lessee obligated himself to treat and wash for the recovery and extraction of diamonds a minimum of 10,000 loads of material annually and that the work should be carried on with diligence and as much more than the amount stated as could reasonably be done. The lease contained no express provision for forfeiture but a forfeiture may be decreed where there is an abandonment of the lease. But such a lease will not be canceled where the proof shows that the lessee had expended \$100,000 in developing and starting operations on the mine and that the year preceding the commencement of the action the lessee had taken out and treated more than 11,000 loads, and the proof was sufficient to show that the lessee had not abandoned operations and had not failed to comply with its terms.

Mauney v. Millar (Arkansas), 203 Southwestern 10, p. 12.

POWER OF EXECUTRIX TO LEASE—DISPOSITION OF ROYALTIES.

The will of a testator stated that certain mining properties in different States, each of an estimated value, should be held at such values until a certain named daughter should arrive at the age of 21 years. The will provided that the money received after the testator's death from each of the mining properties named should be divided and paid in a certain stated manner. Under these provisions the executrix could not lease the mines and receive and merge the royalties into what the will termed the residue of the estate, although the will did authorize the executrix to lease any part of the estate without an order of court.

Campbell's Estate, In re (Utah), 173 Pacific 688, p. 695.

LESSEE NOT PURCHASER OF ORE IN PLACE.

The lessee of an ordinary lease granting the privilege of mining ore from certain described land and providing for the payment of a stipulated royalty per ton on the ore mined is not a purchaser of the ore in place.

United States v. Biwabik Min. Co., 38 Supreme Court Rep. 462, p. 463.

ABANDONMENT—RIGHT TO CANCELLATION.

Where one party to a lease has completely abandoned performance a court of equity will give relief by canceling the lease. This principle applies particularly to mining leases where the sole benefit is to result from continued performance such as one to develop a mine, to pay royalty, or divide the proceeds. For partial breach of such a lease the parties will be remitted to their remedy at law, but in case of an abandonment equity will afford relief by rescission and cancellation.

Mauney v. Millar (Arkansas), 203 Southwestern 10, p. 12.

FORFEITURE—VIOLATION OF STATUTORY PROVISION.

The statute of Texas (Acts, 1913, p. 409) declares that the failure of the owner of a mining permit to comply with certain requirements shall work a revocation of such a permit and the termination of the right to the owner. The legislative purpose seems to have been to require an official ascertainment and record of a forfeiture rather than to leave open indefinitely the issue of the forfeiture. It is to be presumed that in the enactment of this material right into a statute the legislature intended that the decisions of the courts and the settled public policy against forfeitures should be read into it, and it should not be construed as contemplating ipso facto forfeiture.

Underwood v. Robinson (Texas), 204 Southwestern 314.

COAL LEASES.

CONSTRUCTION—REMOVAL OF ALL COAL—TERMINATION OF LEASE.

A coal lease was to continue for 20 years unless all the coal should be sooner removed. "All coal," as used in the lease, is the equivalent to all minable coal and the purpose of such a lease is that the coal should be removed by the lessee with diligence and within the shortest practical time. It is not within the power of the lessee to terminate such a lease as long as he exercises or claims the right to exercise the privileges granted in the lease. When the lessee desired absolution from further payment of a stipulated minimum royalty, it devolved upon him to take an irrevocable position to that end and to so notify the lessor; but so long as the lessee claimed any of the benefits of the lease or exercised the privileges granted thereby he is subjected to the burdens and liabilities imposed by the lease.

Fisher v. Maple Block Coal Co. (Iowa), 168 Northwestern 110, p. 111.

MINIMUM ROYALTY—LIABILITY OF LESSEE—TERMINATION OF LEASE.

A coal lease was to run for 20 years unless all the coal should be sooner removed. It provided for a royalty of 10 cents per ton and

for a minimum royalty of \$1,000 for each year, such sum to be paid whether sufficient coal was mined to produce the same or not. The lessee after 10 years of operation refused to pay the minimum royalty for the reason that the mine became unworkable on account of flooding, which he was unable after good faith efforts to overcome. The lessee did not abandon the mine but continued to exercise his rights under the lease. In order to avoid liability for the minimum royalty it was incumbent upon the lessee to show that he had a right to terminate the lease and that he did terminate the same by some form of surrender and by some manner of notice to the lessor.

Fisher v. Maple Block Coal Co. (Iowa), 168 Northwestern 110, p. 111.

RECOVERY OF MINIMUM ROYALTY—DEFENSE.

A coal lease was to run for 20 years unless the coal was all mined out before that date. The lessee was to pay a royalty of 10 cents per ton monthly and a minimum royalty of \$1,000 for each year payable semiannually. This minimum royalty was to be paid whether sufficient coal was mined to produce the same or not. In an action by the lessor to recover the minimum royalty, the lessee offered to prove that the mine became unworkable because of flooding by reason of which he was unable to operate the mine with profit and had made a good faith offer by the expenditure of large sums to make the mine workable, but offered no proof that he had surrendered the lease or relinquished his rights thereunder. The lessee continued to exercise his privileges under the lease for the greater part of the term for which the minimum royalty was claimed and as long as he claimed any of the benefits of the lease he must be subjected to its burdens.

Fisher v. Maple Block Coal Co. (Iowa), 168 Northwestern 110.

RIGHT OF LESSEE TO REMOVE MINING MACHINERY.

A lease of coal land and a coal mine for 21 years provided that the "lessees shall have the right to remove all and any machinery placed upon said lands under this contract upon the termination of same." The lessee became insolvent, the property was sold at a receiver's sale, and the purchaser operated the mine for some three years. Under the terms of the lease the purchaser from the former lessee or at the receivers' sale had the right to remove the machinery within a reasonable time after the lease was canceled or abandoned. The provision giving the lessee the right to remove the machinery upon the termination of the lease did not mean upon the exact moment the lease was terminated, but it did mean that the property should be removed within a reasonable time after the termination of the lease. But the purchaser from the lessee, after waiting an un-

reasonable time and permitting the original owner and his second lessee to repair and improve the machinery, can not then claim the right to remove the machinery from the land.

Heim v. Brock (Arkansas), 202 Southwestern 36, p. 37.

LEASE BY GUARDIAN—DURATION—VALIDITY OF STATUTE.

The statute of Kentucky (Laws 1916, chap. 99) authorizes the guardian of an infant or of an insane person to lease the real estate of such infant or insane person for the purpose of mining and removing all or part of the coal, oil, or gas or any or all other minerals or mineral substances therein. "Such lease may be of such length of time as the guardian, curator, or committee may approve without being limited to the time at which the disability of such infant or person of unsound mind may be removed." Under this statute a guardian of three minor children, ages, respectively, 11, 16, and 18 years, by order of the proper court leased the lands of his wards for mining purposes and for the mining of all coal in and under the land for a period of 40 years with the privilege of renewal for an additional term of 40 years, at a stipulated royalty of 10 cents for each ton of coal mined and 15 cents for each ton of coke manufactured on the premises with a minimum royalty of \$5,000 for the first year, \$10,000 for the second year, and \$15,000 for each year thereafter. Evidence was heard, and it was adjudged by the court authorizing the lease to the effect that the conditions of the lease were reasonable and satisfactory, and that the royalty was the best obtainable. On appeal it was held that the statute in so far as it attempted to authorize the leasing during the infancy of the owners of the coal, oil, gas and other mineral or mineral substances and products for a period beyond the minority of the infants was void.

Lawrence E. Tierney Coal Co. v. Smith (Kentucky), 203 Southwestern 731, pp. 732-738.

NOTE.—This decision is contrary to the rule adopted in other States under statutes similar if not identical:

McCreary v. Billing, 176 Alabama 314, 58 Southern 311.

Beauchamp v. Bertig, 90 Arkansas 350, 119 Southwestern 75, 23 L. R. A. (N. S.) 659.

Cabin Valley Min. Co. v. Mary Hall, — Oklahoma —, 155 Pacific 570.

Ricardi v. Gabouri, 115 Tennessee 485, 89 Southwestern 98.

Mallen v. Ruth Oil Co., 231 Federal 845.

Instances suggest themselves in all classes of mining, and especially in oil and gas, that would be ruinous to minors if their guardians were not permitted to make leases beyond the term of the majority of the wards. It would appear to be more reasonable and more consistent with the general rule of law and with sound business principles, for a court to hold invalid such a mining lease for an unreasonably long period rather than to hold invalid a statute authorizing guardians to make such leases.

ABANDONMENT—RIGHT OF LESSOR TO TAKE POSSESSION.

The owner of coal lands leased a mine thereon for a period of 21 years. The lease required the lessee to construct and equip a coal mine plant of 400 tons daily capacity and to maintain the plant and machinery in good repair. The lease provided that the lessee retained the right to remove the mining machinery placed upon the land upon the termination of the lease. The lessee became insolvent and the entire plant was sold by a receiver, the purchaser took possession and operated the property for some three years and finally abandoned the lease. The lessor on such abandonment had the right to take possession of and operate the mine included in the lease.

Heim v. Brock (Arkansas), 202 Southwestern 36.

CANCELLATION OF PATENT—BONA FIDE PURCHASER.

A patent for certain coal lands can not be canceled on the ground of fraud in its procurement as against a bona fide lessee who took a lease for a term of years for a valuable consideration, the greater part of which had been paid before the suit to cancel the patent was instituted and without notice of any fraudulent practice.

United States v. Routt County Coal Co., 248 Federal 485, p. 486.

OIL AND GAS LEASES.

CONSTRUCTION—LAND OWNER PROTECTED.

It is the purpose of courts in the construction of oil and mineral leases to give them when the lease will permit, such a construction as will protect the rights of the land owner and enable him to derive from the lease the benefit he had the reasonable right to expect when it was entered into.

Hughes v. Busseyville Oil & Gas Co. (Kentucky), 203 Southwestern 515, p. 517.

CONSTRUCTION—EFFECT GIVEN TO ALL PARTS.

An oil and gas lease was executed in 1902. In 1903, the parties entered into an agreement modifying the lease by providing that after the first four years of the first term of the lease one-half of the 15 per cent of the net proceeds, derived from the business, should be paid to the lessor. It was expressly stated in the modifying agreement that it was intended to modify clauses with which it was in conflict. The Civil Code of California (sec. 1641) requires that in the construction of a contract the whole of it is to be taken together so as to give effect to every part, if practicable, and each clause must help interpret the other. In the light of these provisions

a reasonable effect must, if possible, be given not only the original lease as a whole, but as to the meaning and effect of the modifying clauses as well.

Nathan v. Porter (California Appeals), 172 Pacific 170, p. 173.

See Witherington v. Gypsy Oil Co. (Oklahoma), 172 Pacific 634.

CONSTRUCTION—REASONABLE CONSTRUCTION ADOPTED.

Where the meaning of the language of an oil and gas lease is doubtful, and is fairly susceptible of two constructions, that construction must be given which makes it fair and such as prudent men would naturally execute in preference to a construction that would make it inequitable or such as reasonably prudent men would not be likely to enter into.

Witherington v. Gypsy Oil Co. (Oklahoma), 172 Pacific 634, p. 637.

CONSTRUCTION—AMBIGUOUS TERMS—INTENTION OF PARTIES.

The object of the interpretation and construction of an oil and gas lease is to arrive at and give effect to the mutual intent of the parties as expressed in the lease, and where a lease is ambiguous, the true intention, if it can be ascertained from the contract, must prevail over verbal inaccuracies, inapt expressions, and dry words of the stipulations. It is the duty of a court to place itself as far as possible in the position of the parties at the time the lease was executed and to consider the instrument itself as drawn, its purpose and the circumstances surrounding the transaction and from a consideration of all of these elements to determine upon what sense and meaning of the terms used their minds actually met.

Witherington v. Gypsy Oil Co. (Oklahoma), 172 Pacific 634, p. 635.

CONSTRUCTION AND CONSIDERATION.

In the construction of an oil lease and in determining whether a consideration is sufficient in amount to be classed as adequate and valuable, a court must look to the subject matter of the contract and its value to the parties concerned. The value of an exclusive option to explore and mine oil and gas is governed largely by the prospects of their discovery in the given territory and their worth when discovered. It is easy to imagine territory in which this privilege would be worth much and other territory in which it would have no practical value. The sum of \$70 cash actually paid must be regarded as a sum sufficient to make the issue of valuable and adequate consideration as one of fact to be passed upon by a court or jury. Such a consideration is sufficient to prevent the cancelation of an otherwise unilateral contract.

Griffen v. Bell (Texas Civil Appeals), 202 Southwestern 1034, p. 1037.

CONSTRUCTION—SUCCESSIVE EXTENSIONS OF TIME—CONSIDERATION.

An oil and gas lease stipulated that unless the lessee began drilling a well within six months from its date the lease should expire, but the lease gave the lessee the right of having successive extensions upon the payment of stipulated payments of money and the payment of a stated sum in advance was not only the consideration for the privilege extending over the first term of six months but for all the rights and privileges, conditional and unconditional, which the contract conferred, including the conditional right of claiming an extension of the option. The payment of the sum stated was what induced the execution of the contract and was the consideration for all the rights and privileges therein granted. The sum paid can not be treated as a payment of the rental for the first term of six months; but when that term expired the lessee could have demanded an extension of time upon the tender of the sum agreed upon. This was a valuable right which emanated from the contract and for the grant of which the sum paid was the consideration.

Griffen v. Bell (Texas Civil Appeals), 202 Southwestern 1034, p. 1037.

CONSTRUCTION—PERIOD OF DURATION.

An oil and gas lease provided that it should be for a period of two years and as long thereafter as the lessee may produce oil and gas therefrom in paying quantities. The lease bound the lessee to complete a well within two years and contained a provision to the effect that the extension of the lease after the two-year term should depend upon productions at the time and thereafter of oil and gas in paying quantities as "herein provided." A well was drilled on the premises as provided and was at the expiration of two years and thereafter producing oil in paying quantities and the lessor's royalty therefrom amounted to \$180 a year. This was sufficient compliance with the requirements and sufficient to extend the period of the lease.

Hughes v. Busseyville Oil & Gas Co. (Kentucky), 203 Southwestern 515, p. 516.

CONSTRUCTION—PERIOD OF EXISTENCE—PAYMENT OF RENTALS.

An oil and gas lease provided that it should be for a term and period of two years and as much longer, not exceeding 50 years, as coal, oil, water, mineral water, gas, or other minerals were found in paying quantities thereon. If no mineral should be discovered within two years the lease was to become null and void unless the lessee should pay \$1 per acre per year at or before the end of each year thereafter. By these provisions the lease was to extend 50 years if

gas or oil was found in paying quantities or if the annual rental of \$1 an acre was paid before the end of each year until a well should be found on the premises. So long as the payments are made according to the terms of the lease, the lease is valid and not subject to forfeiture or cancellation, nor can the lessee be enjoined from drilling upon the premises.

Arnold v. Garnett Light & Fuel Co. (Kansas), 172 Pacific 1012, p. 1013.

CONSTRUCTION—USE OF TECHNICAL WORDS—PAROL EVIDENCE TO EXPLAIN.

An oil and gas lease contained a provision to the effect that when a well was commenced the drilling should be prosecuted with due diligence until such well was completed. The word "completed" in the lease is a technical word relating to oil and gas drilling operations; and technical words in a contract are to be interpreted as usually understood by persons in the profession or business to which they relate and expert testimony is admissible, where there is a disagreement as to the meaning and purport of the word "completed" to explain the sense in which the term was understood generally by those engaged in the business of drilling oil or gas wells.

Frost v. Martin (Texas Civil Appeals), 203 Southwestern 72, p. 74.

CONSTRUCTION—NATURE OF ESTATE GRANTED.

An oil and gas lease is not a grant of the oil and gas that is in the ground, but of such part thereof as the lessee may find, and passes no estate that can be the subject of ejectment or other real action.

Brennan v. Hunter (Oklahoma), 172 Pacific 49, p. 50.

NATURE—NO ESTATE GRANTED.

A lease or contract granting the right to the lessee to enter on the land described to explore for oil and gas and if oil and gas be found in paying quantities to operate and produce the same, is not a lease in the strict sense; but the term "lease" is applied to such instruments merely through habit and for convenience. Such an instrument creates no estate in land but merely a kind of license. It creates an incorporeal hereditament, a right growing out of or concerning or annexed to a corporeal thing but not the substance of the thing itself.

Huston v. Cox (Kansas), 172 Pacific 992, p. 993.

CONTRACT FOR EXPLORATION OF LAND FOR OIL AND GAS.

A contract or lease for the exploration of land for minerals, oil, and gas, although designated a sale by the parties, was the grant of an exclusive right to search for, take and appropriate the minerals

mentioned in the contract, and is in effect a lease of the land described for mining purposes.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 483.

CONSTRUCTION—DRILLING WELL—MEANING OF COMPLETED WELL.

An oil and gas lease required the lessee to begin operations within 12 months and provided that "when a well is once begun the drilling thereof shall be prosecuted with due diligence until same is completed." The lease also provided that a failure to perform the obligations of the lease should render it null and void. The lessee, pursuant to the terms of the lease began drilling a well that was carried on continuously night and day until a depth of over 2,100 feet was reached, but no oil or gas was discovered. If the lessee began in good faith the drilling of a well within the time stipulated he released himself from the alternative obligation to pay rental and from the penalty of forfeiture for a failure to do so. The term "completed" as used in the lease means finished or sunk to the depth necessary to find oil or gas in paying quantities, or to such a depth as in the absence of such oil or gas would reasonably preclude the probability of finding oil or gas at a further depth. It can not be construed to mean that the lessee bound himself, under penalty of forfeiture to sink a producing well or in the absence of oil or gas to bore through to China.

Frost v. Martin (Texas Civil Appeals), 203 Southwestern 72, p. 73.

CONSTRUCTION—COMPLETED WELL—MEANING.

A completed oil well, as used in a lease requiring the completion of a well in a certain time or right to forfeit the lease means the drilling of a well deep enough to discover oil or gas or deep enough according to the experience of well drillers in the same or adjoining fields to determine with reasonable certainty that there is no oil or gas bearing sand or rock in the particular field. And if a well has been drilled to a depth regarded by experienced drillers as sufficient to test the field, it is a completed well, although no oil or gas has been discovered.

Frost v. Martin (Texas Civil Appeals), 203 Southwestern 72, p. 74.

CONSTRUCTION—SUSPENSION OF DRILLING—FORFEITURE.

An oil and gas lease provided that if operations were not begun on or before a stated date the lease should terminate unless the lessee should pay to the lessor a certain stated amount. The payment of the stipulated amount should operate to confer on the lessee the

privilege of deferring the time limit for six months from the stated date. It also provided that after drilling operations had begun, the payment of the sum should not be required if the period of suspension of drilling was less than 30 days. The lessee began drilling operations as required prior to May 29, 1916, and completed a producing oil well on August 7, 1916; but no further drilling operations were begun or attempted within 30 days from the completion of such well. The completion of a producing well did not terminate or avoid the provision for continued drilling, or the payment of the stated amount, and the lease was subject to forfeiture on account of the suspension of drilling following the completion of the well; but this forfeiture could have been prevented by the lessee by the payment of the stipulated amount in lieu of drilling operations for each six-month period following the suspension until resumption of operations.

Stein v. Producers' Oil Co. (Texas Civil Appeals), 203 Southwestern 126, p. 128,

CONSTRUCTION—EFFECT OF SURRENDER CLAUSE—RIGHTS OF LESSEE.

The owner of land under an existing oil and gas lease executed a second lease that contained a clause by the terms of which the lessee could at any time upon the payment of \$1 surrender the premises and relieve himself from any obligation under the lease. This provision makes such a lease unilateral, and is such a one as a court of equity will refuse to enforce, and it will not furnish the basis for an action in ejectment or other real action. The lessee in such a lease has no standing to question the validity of the first lease or to maintain ejectment against the original lessee.

Brennan v. Hunter (Oklahoma), 172 Pacific 49, p. 50.

CONSTRUCTION—RIGHT OF POSSESSION—INJUNCTION.

The lessee of an oil and gas lease sought to enjoin a subsequent lessee of the same land from interfering with the peaceful possession of the complainant. The proofs showed that the complainant had never entered upon or taken possession of the premises under its lease, but that the second lessee had taken and was in possession of the premises under its lease and had been in the possession of the land for more than seven months at the commencement of the suit. A preliminary injunction may issue to maintain a complainant in possession, but it should not be allowed to oust one already in possession of property.

Pure Oil Operating Co. v. Gulf Refining Co., 143 Louisiana ———, 78 Southern 560.

CONSIDERATION—UNILATERAL CONTRACT—WHO MAY QUESTION.

The lessor in an oil and gas lease is the only person who can urge that the lease is unilateral by reason of the presence of a certain clause therein and claim a cancellation of the lease. A lessee in a subsequent lease of the same premises can not urge the invalidity of a prior lease on the ground that it is unilateral.

Brennan v. Hunter (Oklahoma), 172 Pacific 49, p. 50.

CONSTRUCTION—NET PROFITS AND NET PROCEEDS.

An oil and gas lease provided that the net profits were to be determined by deducting from the gross income only the royalties and operating expenses, as distinguished and considered apart from "capital expenses." A modifying clause provided for a change in the payment of royalty based on the "net proceeds" derived from the business. The "net proceeds" provided for in the modifying clause was not dependent upon the cost of capitalization but only upon the sum total of royalties and operating expenses and in estimating the net proceeds the lessee could not deduct capital expenses in addition to operating expenses.

Nathan v. Porter (California Appeals), 172 Pacific 107, p. 173.

CONSTRUCTION—RIGHT OF LESSOR TO GAS FROM OIL WELLS.

An oil and gas lease contained two separate provisions to the effect: (1) That if gas is found the lessor is to have sufficient gas for domestic purposes free of charge and the remainder, with all gas from oil wells to go to the lessee; (2) if the lessee shall market any gas from any well producing gas the lessor shall receive therefor at the rate of one-fourth of all the gas marketed. If the first provision stood alone the lessor would only be entitled to gas for domestic purposes free of charge and would not be entitled to royalty from gas produced from an oil well. But the first provision must be considered as affected or modified by the second, which provides that the lessor shall receive at the rate of one-fourth of all the gas marketed or sold from any well producing gas. The second provision entitles the lessor to an account for one-fourth part of the proceeds of gasoline produced from casing-head gas as well as the one-fourth part of all gas from oil wells that was marketed.

Witherington v. Gypsy Oil Co. (Oklahoma), 172 Pacific 634, p. 635.

NATURE AND CONSTRUCTION—LESSEE'S RIGHT TO POSSESSION.

An oil and gas lease gave the lessee the right to go upon the premises and search for oil and gas and to commence operations within the initial period and continue the same with reasonable dili-

gence until oil or gas was found in paying quantities, or until it was demonstrated that neither existed in the land. The lessee by the lease acquired no vested estate in the premises, but he had the right to the possession of the land to the extent reasonably necessary to perform the obligations imposed by the terms of the lease.

Brennan v. Hunter (Oklahoma), 172 Pacific 49, p. 50.

CONSTRUCTION—IMPLIED COVENANT TO DEVELOP.

The development of mineral, oil and gas lands is too expensive for the land owner himself to undertake and requires skill and capital ordinarily beyond the reach of the owner of the soil and that these resources be developed and profit realized therefrom it is necessary that the privilege be granted to persons who are engaged in the business of exploring and developing oil and gas and mineral fields. The fluctuating and uncertain character and value of this class of property renders it necessary for the protection of the land owners that the properties should be developed as speedily as possible, and the lessee for such purpose will not be permitted to hold the land for speculative or other purposes an unreasonable length of time for a mere nominal rent when a royalty on the product is the chief object for the execution of the lease.

Hughes v. Busseyville Oil & Gas Co. (Kentucky), 203 Southwestern 515, p. 517.

IMPLIED OBLIGATION TO DEVELOP—INTENTION OF PARTIES.

The application of the rule to the effect that an oil lease contains an implied covenant on the part of the lessee to develop the leased premises, depends on circumstances and on the intention of the parties. An implied covenant to develop can not be read into a lease of land for oil and gas where the territory had not before been developed and its productive value was not known; where the lessee was a local corporation, with small capital and only willing to undertake the venture and the risk involved under the term of a lease that the land owner was willing to make in order to secure some development and profit from the land and where it does not appear that either of the parties at the time thought of putting down the probable number of wells that it would take to fully test the oil properties of the land, as to do so would require the expenditure of a much larger sum than the lessee had or could get or desired to invest in the enterprise.

Hughes v. Busseyville Oil & Gas Co. (Kentucky), 203 Southwestern 515, p. 517.

COVENANT TO DEVELOP NOT IMPLIED.

A covenant to develop thoroughly or completely the premises leased for oil purposes will not be implied where it appears that it costs about \$4,000 to drill a well and that a well drilled, and other wells in the same field produce not more than 2 barrels a day, and where it appears that the lessee is not holding the land for speculative purposes and that wells drilled on neighboring or adjoining tracts are not draining the oil from the leased tract. A lessee may be compelled to develop and protect the lines where it appears that wells on adjoining lands are drawing from the leased lands.

Hughes v. Busseyville Oil & Gas Co. (Kentucky), 203 Southwestern 515, p. 517.

CONSIDERATION AND VALIDITY—IMPLIED COVENANT.

An oil and gas lease granted in consideration of \$1 actually paid and by which the lessee covenanted to complete a well within one year or to pay 10 cents per acre yearly in advance for each additional year that such completion is delayed, and by which he covenanted to pay to the lessor one-eighth of all oil produced, is not invalid during the first year or within a reasonable time during which an implied covenant to commence operations under penalty of forfeiture may be enforced, either by reason of the smallness of the consideration or the reservation of the right of the lessee on payment of \$1 to surrender the lease for cancellation.

Raydure v. Lindley, 249 Federal 675, p. 676.

FAILURE TO DEVELOP—RIGHT OF SECOND LESSEE TO TERMINATE FIRST LEASE.

An oil and gas lease dated February 18, 1914, required the lessee to commence development within 90 days. The lease contained no provision for delay in development by the payment of rentals. Development was commenced within the period stated and a well completed, in which gas was found in paying quantities and the lessee paid the lessor the stipulated rental for a period of 12 months. Under such a state of facts a second lessee of the premises can not maintain an action in ejectment against the first lessee upon the ground either for a failure to develop or that the lease is unilateral.

Brennan v. Hunter (Oklahoma), 172 Pacific 49, p. 50.

FAILURE TO DRILL—REMEDY OF LESSOR.

An oil and gas lease provided that if the lessee failed to commence operations by a certain date the lessee should pay the lessor a stated amount per month for each and every month in which default should

be made in the commencement of operations. The lease also provided that a failure on the part of the lessee to comply with its conditions, or on failure to diligently prosecute the work of drilling the lease should be void. This latter provision constitutes an option given to the lessor which in lieu of insisting on the pay of the \$100 per month he might or might not at his election cancel the lease. But the lessee after failing to commence operations before the date stated could not insist that his failure to perform the covenant should be equivalent to a performance. Under the terms of the lease the lessor may, instead of exercising the right which he has to terminate the lease, insist upon the payment of the sum stipulated to be paid for failure to comply with the covenant to commence operations at the date stated.

Allen v. Marver (California), 172 Pacific 980.

OPTION TO DEVELOP OIL LAND—FAILURE TO DEVELOP.

A lessee acquired from a land owner by the payment of a stated sum in advance an option to develop the lessor's land for oil. The lease was acquired for speculative purposes and without any intention on the part of the lessee of drilling a well on the land and these facts were known to the lessor and he accepted the cash payment with the knowledge of such intention. In such case the absence of an intention to develop the land is not such a fraud as will entitle the lessor to a rescission of the contract. The lessee did not bind himself to sink wells and violated no covenant of the agreement by a failure to do so.

Griffen v. Bell (Texas Civil Appeals), 202 Southwestern 1034, p. 1037.

CONTRACT TO DRILL OR PAY RENTAL—LESSOR'S OPTION.

An oil and gas lease required the lessee to begin drilling within a stated time or pay a certain stated sum per month for failure to commence drilling and also provided that a failure on the part of the lessee to comply with the conditions of the lease would render the lease void. These provisions give the lessor the option as to his remedy and he may elect to put an end to the lease or he may elect to have the lease continued in force to the end of the term and enforce the payment of the amount due each month.

Allen v. Marver (California), 172 Pacific 980, p. 981.

BREACH OF CONTRACT TO DRILL—MEASURE OF DAMAGES.

The lessee in an oil and gas lease of certain lands entered into a contract with an oil-well driller to drill on the leased land an oil well to the depth of 1,260 feet at 85 cents per foot. Pursuant to the con-

tract the driller moved his drilling machinery and equipment onto the land, commenced drilling and drilled to the depth of 10 feet. A dispute arising between the lessor and the lessee as to certain terms of the lease the lessee directed the well driller to suspend drilling until the dispute over the lease should be settled, but requested him to remain on the premises until the dispute was settled, but finally stopped the drilling altogether and prevented the completion of the well. In an action for damages for a breach of the contract the measure of damages which the well driller was entitled to recover was the expense necessarily incurred in hauling his drilling rig and machinery from where they were to the well that he began drilling, the expense necessarily incurred in rigging up and drilling to the point where drilling was stopped, and reasonable compensation for services in removing the rigging and drilling machinery, reasonable compensation for the enforced idleness of the rig and machinery, and the reasonable value of the well driller's services lost during the time he remained on the premises at the request of the lessee of the land.

Letcher v. Maloney (Oklahoma), 172 Pacific 972, p. 973.

BREACH—LIQUIDATED DAMAGES OR PENALTY.

An oil and gas lease provided that the lessee should begin drilling operations by a certain date and on failure to do so should pay the lessor \$100 per month for each and every month in which he fails to commence operations. The covenant to pay the \$100 a month is not a penalty but is liquidated damages. In an action on such a lease to recover the amount of the monthly payments, proof of the amount of damages is unnecessary as the amount is fixed by the terms of the lease. Damages for breaches of contract touching future interests in oil wells of unknown value are of such remote and speculative value as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement. It would be impossible to calculate with any degree of certainty the amount of damage sustained by a lessor by reason of the breach of the covenant of such a lease by the lessee.

Allen v. Marver (California), 172 Pacific 980, p. 981.

LEASE OF MINERALS—RIGHT TO USE OF SURFACE.

Ordinarily the leasing of minerals, by implication, carries with it the right to use as much of the surface as may be actually necessary to mine from the stratum conveyed. The same rule applies to the grantor who excepts a stratum from the soil of his land conveyed to another.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 484.

CONSTRUCTION—CONSENT TO DRILL—CONSENT OF ASSIGNEE NOT REQUIRED.

An oil and gas lease conveyed all the oil and other minerals under a certain tract of land on the fixed payment of royalties. The lease gave the lessee the right to subdivide and sell portions thereof and prohibited the lessee from drilling wells within 300 feet of the residence of the lessor except with the consent of "both parties hereto, their heirs and assigns." This provision was intended to prevent the lessee from drilling within the excepted distance without the consent of the lessor. It was also intended to prevent the lessor from leasing to third persons for drilling purposes the tract within the prohibited distance without the consent of the lessee. But it can not be construed to mean that where the leased premises had been divided up into small areas and proportionate parts of the lease assigned to each purchaser that the consent of each of the assignees should be obtained, where the original lessor consented to the drilling within the excepted distance by either the original lessee or any one of his assignees. Under such circumstances one assignee of a part of the lease can not enjoin another assignee from drilling within the prohibited distance.

McFarlane v. Gulf Production Co. (Texas Civil Appeals), 204 Southwestern 460, p. 461.

DRILLING WITH CONSENT OF BOTH PARTIES—COVENANT RUNNING WITH LAND.

A stipulation in an oil lease to the effect that no wells should be drilled within 300 feet of a dwelling house unless with the consent of both parties, indicates that the parties in making the lease did not intend to burden the property and this intention will prevail as against an effort to make the provision a covenant running with the land.

McFarlane v. Gulf Production Co. (Texas Civil Appeals), 204 Southwestern 460, p. 461.

RIGHT OF RENEWAL—DISPOSITION OF DEPOSIT.

An oil and gas lease provided that it might be renewed for another year by the lessee paying or depositing in a certain stated bank a certain stated amount on or before the expiration of the lease. On failure of the lessee to make the required deposit within the stated time, he could not claim the right of renewal because the lessor failed to return the deposits as the lessor was under no obligation to do more than inform the bank of its willingness to accept the deposits.

Pure Oil Operating Co. v. Gulf Refining Co., 143 Louisiana ———, 78 Southern 560, p. 561.

RIGHT OF RENEWAL—PAYMENT OR DEPOSIT OF RENTALS.

An oil and gas lease expired on March 29, 1913. It contained a provision to the effect that the lessee could renew the lease for another year by a payment of 10 cents per acre and provided that "such payment for such renewal may be made directly to the party of the first part or deposited to his credit." The required amount for renewal was \$8. Six dollars of this sum was deposited, but was refused by the lessor, and the lessee subsequently sent a check for the additional \$2. The question as to whether this second deposit was made in time was one of fact to be determined in the trial court, and the burden of proof was on the lessee to show that it had been so made.

Pure Oil Operating Co. v. Gulf Refining Co., 143 Louisiana ———, 78 Southern 560, p. 561.

ACCEPTANCE OF DELAY RENTALS—FORFEITURE—VALIDITY OF SECOND LEASE.

An oil and gas lease provided for the payment of a certain sum quarterly as delay rentals. After its execution, on a survey of the land the acreage was found to be less than that stated in the lease, and the amount of the quarterly delay rentals was reduced accordingly. The land owner, standing in the place of the original lessor, accepted the smaller amounts in payment of the quarterly delay rentals. The land owner can not after accepting such payments arbitrarily refuse to receive them and demand the full amount as stipulated in the lease and on default of payment declare a forfeiture and execute a valid second lease on the land.

Monarch Gas Co. v. Roy (West Virginia), 95 Southeastern 789, p. 791.

ACCEPTANCES OF RENTALS BY MARRIED WOMAN—RIGHT TO FORFEITURE—ESTOPPEL.

A married woman acquired lands subject to an oil and gas lease. The assignee of the lease inquired of her if there were any unpaid delay rentals and was informed that there were none. It was a matter peculiarly within her knowledge and which directly concerned her and her reply was equivalent to an affirmation or representation of payment and she can not afterwards be permitted to take advantage of her own dereliction, but she is concluded by the information imparted. She can not afterwards be heard to assert a forfeiture which she failed to declare at the proper time when by her representations she induced the assignee of the lease to predicate his action upon the assumption of a previous satisfactory compliance with the requirements of the lease by the lessee.

Monarch Gas Co. v. Roy (West Virginia), 95 Southeastern 789, p. 790.

POWER OF LESSEES TO MORTGAGE.

The legislature of Louisiana (Acts 1910, p. 393) authorizes the lessees or owners of contracts granting the right to explore and develop land for oil, gas, and other minerals to mortgage their leases.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 484.

PROOF OF VALUE OF LEASE—OPINION OF WITNESS.

In proving the value of an oil lease on a 10-acre tract of land with a flowing well thereon, it is competent to prove the value of an oil lease on similar adjoining tracts and it was proper to prove what an owner of an adjoining lease was offered for his lease and also to prove the sum for which he sold part of his tract. It was also proper for the owner of the lease of the adjoining tract, who had sold part of his lease and had offers for the remaining part, to give his opinion of the fair and reasonable market value of the lease in controversy.

Peden Iron & Steel Co. v. Jenkins (Texas Civil Appeals), 203 Southwestern 180, p. 184.

LEASE BY ONE TENANT IN COMMON—FRAUD.

The owner of the surface of a tract of land who was also a tenant in common with others in the ownership of the oil and gas under the land, agreed for a sufficient consideration to lease the land for oil and gas purposes, the royalties to be divided according to the relative ownership of the oil and gas. The owner of the surface was to receive in person all sums paid in the way of delayed rentals. The surface owner after leasing the land for oil and gas purposes and after gas had been discovered in the immediate vicinity and wells drilled on other lands owned by him in such position that they would drain the land in controversy, extended the lease for a long period with an agreement to accept delayed rentals in lieu of drilling. Such a lease under such circumstances was a fraud on the rights of his cotenant. The defrauded cotenant could by suit have the lease canceled or he could sue and recover his proportion of the sums received as delayed rentals.

McMillan v. Connor (West Virginia), 95 Southeastern 642, p. 643.

OWNERSHIP OF OIL WELL—PRESUMPTION.

An oil well was located near a disputed boundary line and neither the lessee of the land on one side nor the owner of the land on the other side of the line knew that the well was on his land, but each claimed the well. In a subsequent lease by the landowner the chances that the owner of the land was the owner of the oil well, and that

it would be included in the lease, may reasonably be presumed to have been in the contemplation of the parties and as between the lessor and the lessee the presumption is that the well was included in the lease.

Russell v. Producers Oil Co., 143 Louisiana ———, 78 Southern 473, p. 476.

PURCHASE PENDING SUIT—CONCLUSIVENESS OF JUDGMENT.

A person who, pending a suit by a lessor to cancel a lease, himself made a contract with the lessor to purchase the leased premises at a certain stated price per acre if the lease in the pending suit was declared void, otherwise he should be discharged from the obligation to purchase, became from that time a privy with the lessor and was bound by every act of his in the suit and by the judgment against the lessor, the complainant in the action, and can not in a subsequent action between the same parties relitigate the same questions.

Miller v. Bely Oil Co., 248 Federal 83, p. 92.

APPOINTMENT OF RECEIVER—JURISDICTION.

One partner brought suit for a dissolution of a partnership and for an accounting by reason of the operations of the partnership under an oil and gas lease and for a disposition of the partnership property. The appointment of a receiver was asked by way of provisional and auxiliary relief. The real estate under lease was not within the jurisdiction of the court. A court having jurisdiction of the parties may appoint a receiver for an oil and gas lease of land beyond the jurisdiction of the court; and especially where the lease creates only an incorporeal hereditament.

Huston v. Cox (Kansas), 172 Pacific 992, p. 993.

LIABILITY OF AGENT—UNDISCLOSED PRINCIPAL.

The president of an oil and gas company entered into an oral contract with a well driller to drill an oil well on a certain tract of land. The president acting as agent did not disclose to the well driller his principal, the oil and gas company, and the well driller had no knowledge that the president was acting for the oil and gas company and did not have such information until after a breach of the contract by the agent. Under such facts the president of the company was personally liable under the rule that where an agent enters into a contract with a third person and does not disclose to such third person his principal, the agent is liable upon the contract, if the contracting party has no knowledge that the agent is acting for an undisclosed principal.

Letcher v. Maloney (Oklahoma), 172 Pacific 972, p. 973.

CANCELLATION—RECOVERY OF LIEU PAYMENTS.

An oil and gas lease provided that drilling should begin on or before a certain date or the lease terminate unless the lessee should pay at the beginning of each 6-month period a certain stated sum. The lease also recited that it should not obligate the lessee to make any such payment or to drill or otherwise carry on operations against its wish or option. Under these provisions the lease is not to be constructed as imposing an absolute obligation on the lessee either to drill or pay the stated sum, but as simply providing that the doing of the one or the other of these things is necessary to prevent a termination of the lease and the intent is to provide that the failure to drill or to make the payments in lieu of drilling merely terminates the contract and that is the only contractual liability that can be enforced against the lessee for a failure to do either of these things; and the lessor in an action to recover the unpaid sums stated in the lease and to cancel the lease is not entitled to a judgment both for the cancellation and for the cash payment. He can not invoke both the forfeiture for nonpayment and then collect the payment on account of the nonpayment of which the forfeiture was sought.

Stein v. Producers' Oil Co. (Texas Civil Appeals), 203 Southwestern 126, p. 128.

FORFEITURE—LESSOR.

The lessor in an oil and gas lease is ordinarily the only person who can take advantage of a condition in a lease providing for a forfeiture for failure of the lessee to comply with its terms, "unless there is an express stipulation in the lease that same shall be null and void upon failure of the lessee to comply with its terms."

Brennan v. Hunter (Oklahoma), 172 Pacific 49.

FORFEITURE—REASONABLE OPPORTUNITY FOR PREVENTING.

An oil and gas lease required the lessee to begin drilling operations on or before a stated date. It also provided that on payment of a certain stated sum drilling operations might be deferred for a period of six months. The lease also provided that if after operations were begun they should be suspended for 30 days or more without the payment of the stipulated sum the lease should be subject to forfeiture. The lease also provided that after oil was discovered in paying quantities the lessee should be exempt from loss or forfeiture except after judicial ascertainment and a reasonable opportunity thereafter to prevent forfeiture. The lessee began operations within the stated time and drilled a well producing oil in paying quantities and drilling operations were thereupon suspended for more than 30 days with-

out the payment or tender of the stipulated amount. The lessor subsequently brought suit for a cancelation of the lease. Under these circumstances it was the duty of the court to enter judgment canceling the lease unless the lessee should pay the stipulated sum in lieu of drilling operations for each six-month period beginning with the completion of the producing well to the date of the judgment, and permitting the lessee 30 days after judgment in which to make payment and renew drilling operations.

Stein v. Producers' Oil Co. (Texas Civil Appeals), 203 Southwestern 126, p. 128.

FORFEITURE—EXCEPTION TO RULE.

Forfeitures are not generally favored by law but forfeitures which arise in oil and gas leases by reason of the neglect of a lessee to develop or operate the leased premises are rather favored because of the peculiar character of the product to be produced. It has been found necessary to guard the rights of land owners by numerous covenants, some of the most stringent kind, to prevent their land being burdened with unexecuted and profitless leases incompatible with the rights of alienation and the use of the land. Forfeiture for nondevelopment or delay is essential to profit and public interest in relation to the use and alienation of property. Perhaps in no other class of leases is prompt performance of contract so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other.

Hughes v. Busseyville Oil & Gas Co. (Kentucky), 203 Southwestern 515, p. 517.

MINING PROPERTIES.

TAXATION.

CLASSIFICATION OF PROPERTY FOR TAXATION.

A State may classify the property within its borders and impose unequal taxation provided the taxes are uniform on all property in each class. Such a classification does not violate the provisions of the fourteenth amendment to the Constitution of the United States. A State statute for the taxation of sulphur mines, or persons engaged in mining sulphur, is not void because the person complaining is the only person in the State engaged in sulphur mining. This can not affect the classification.

Union Sulphur Co. v. Reed, 249 Federal 172, p. 174.

MINING INTERESTS TAXABLE.

As different elements of land are capable of being severed and separately owned the State of Louisiana now authorizes separate assessments against the owners of the different interests; and if different parts or interests of land have been severed and are held by different persons, the land may attach to one and the coal or oil, or mineral rights to another.

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 484.

VALUATION OF MINERAL LANDS—ERRORS OF JUDGMENT.

Errors of judgment by taxing officers will not support a claim of discrimination in valuations between mineral lands and other lands. The good faith of such officers and the validity of their actions is presumed and when assailed the burden of proof is on the complaining party.

Sunday Lake Iron Co. v. Wakefield Township, 38 Supreme Court Rep. 495.

VALUATION FOR ASSESSMENT—MINERAL INTEREST.

Section 39, chapter 29, Barnes' Code (Code 1913, sec. 923), construed with reference to other provisions of the code does not require or authorize the valuation and entry on the land books for tax-

ation of undivided interests in timber, coal, oil, and gas or other minerals or mineral substances but only the whole of such estates or interests may be separately entered and taxed to the owner or owners thereof.

State v. Guffey (West Virginia), 95 Southeastern 1048, p. 1049.

EQUALITY IN VALUATION—CONSTITUTIONAL PROTECTION.

The owner of a mine or of mineral lands is denied the equal protection clause of the fourteenth amendment of the Constitution where his mine or mineral lands is assessed for taxation at the full cash value and there is an intentional systematic undervaluation by State officers of other taxable property in the same class.

Sunday Lake Iron Co. v. Wakefield Township, 38 Supreme Court Rep. 495.

INCREASED VALUATION—VALIDITY OF ASSESSMENT.

Local taxing officers valued certain mineral lands for the purpose of taxation at \$65,000. The State board raised the assessment to \$1,071,000. At the time the owner of the mineral lands first challenged the valuation placed on the mineral lands of others as compared with that placed upon his mineral lands, no adequate time remained for detailed consideration and there was not sufficient evidence before the board to justify immediate and general revaluation. In refusing to hear evidence of the value of the other property of the same class, the owner of the mineral lands was not deprived of the equal protection of the law, where it is made to appear that the next year a diligent and successful effort was made to rectify any inequality.

Sunday Lake Iron Co. v. Wakefield Township, 38 Supreme Court Rep. 495.

VALUATION OF SEPARATE ESTATES—ASSESSMENT AS A UNIT.

The statute of 1913 (ch. 29) provides for annual valuations of lands and interests or estates therein and the assessor on a segregation of any such estate is required to assess such severed estates to the owners thereof and therein; but the assessor is not now limited as formerly to an apportionment of former values of the whole between the estates so segregated. There is nothing in the act of 1905 even impliedly sanctioning the assessment of undivided interests in such segregated estates. The statute contemplates the whole of any estate, not undivided interests therein.

State v. Guffey (West Virginia), 95 Southeastern 1048, p. 1049.

SEPARATE ASSESSMENT OR SALE OF UNDIVIDED INTEREST—VALIDITY.

The whole of any estate in land whether surface, timber, coal, oil or gas, after severance may be the subject of separate assessment, but the separate assessments or sale for taxes of undivided interest therein are void.

State v. Guffey (West Virginia), 95 Southeastern 1048, p 1049.

AUTHORITY OF COUNTY TREASURER—OMITTED PROPERTY.

The right and duty of a county treasurer under the statute of Oklahoma (Rev. Laws 1910, secs 1732, 7449, as amended by Laws 1915, ch. 189) do not cease until he has exhausted all the means for this purpose placed at his disposal by the legislature. As it is his duty and right to act for the State in giving the original notice, so it continues to be his duty and right to pursue to the end, with the advice and counsel of the law officers of the State all the remedies afforded by the statute for the collection of these taxes. In the case of omitted property a tax ferret is employed to assist the treasurer in collecting taxes and not to collect such taxes.

Kramer v. Gypsy Oil Co (Oklahoma), 173 Pacific 802, p. 805.

ASSESSMENT OF OMITTED PROPERTY—NATURE OF PROCEEDING.

A proceeding for the assessment and collection of taxes due on omitted property is not a civil action but is a remedial proceeding granted by the legislature conferring upon the county treasurer a remedial right and duty not heretofore existing for the collection of taxes due on omitted property. The legislature as a matter of grace gave the tax payer the right to appeal to the county court where summary proceeding may be heard de novo.

Kramer v. Gypsy Oil Co. (Oklahoma), 173 Pacific 802, p. 805.

FRANCHISE TAX—ANNUAL LICENSE FEE.

The annual license fee or franchise tax imposed upon corporations by the New Jersey statute (Laws 1906, p. 31) is payable each year in advance, the year beginning with the first Tuesday of May.

Old Dominion Copper Min. & Smelting Co. v. State Board of Taxes, etc. (New Jersey), 103 Atlantic 690.

LICENSE TAX ON MINING.

The statute of Louisiana (Act 145 of 1916) required a corporation engaged in mining sulphur to pay a tax of ten cents per ton for the privilege of continuing operations during the ensuing three months.

No lien is imposed on the amount of sulphur previously mined and no direct seizure of the sulphur is provided for. If the tax is not paid it must be collected in the same manner as all other license taxes by suit in a court of competent jurisdiction. This tax can be classed as a license tax and the fact that the operator of the sulphur mine can not pay the tax and can not stop operations without destroying his mine can not affect the validity of the tax.

Union Sulphur Co. v. Reed, 249 Federal 172, p. 173.

LICENSE TAX ON OIL AND GAS BUSINESS.

The Legislature of Louisiana (Acts 1912, p. 437; Acts 1916, p. 37) requires an annual license tax to be paid by persons engaged in "severing natural products, including all forms of timber, turpentine and minerals, including oil and gas, sulphur and sale from the soil."

De Moss v. Sample, 143 Louisiana ———, 78 Southern 482, p. 484.

CORPORATION EXCISE TAX—DEDUCTIONS FROM INCOME.

In 1898, a mining company by assignment of a lease acquired a leasehold estate in certain ore producing properties from which it mined ore from that date to and including the year 1910. The company in the latter year made a return to the collector of internal revenue of its gross income and from the total deducted, to cover realization of unearned increment, something over \$256,000. The amount was found by multiplying the number of tons of ore mined during the year by 48 $\frac{3}{4}$ cents, which was the market value of the ore in place on January 1, 1909, the date upon which the returns for taxation were commenced. The deduction was made in good faith upon the claim that it was a reasonable allowance for depreciation of the property for the year. The assignee of a lease is in no sense a purchaser of ore in place, but he takes from the property the ore mined paying for the privilege so much per ton for each ton removed. He has this right or privilege under his lease so long as he sees fit to hold the same without exercising the privilege of cancellation therein contained. The mining company, as assignee of the lease, was not entitled to deduct \$265,000, the market value of the ore in place from its gross income derived from a sale of the ore mined during the year as so much depletion of capital assets.

United States v. Biwabik Min. Co., 38 Supreme Court Rep. 462, p. 463.

CORPORATION EXCISE TAX—INCOME FROM SALE OF STOCK—METHOD OF COMPUTING.

A mining corporation, in 1902, purchased the shares of stock of another mining corporation for \$800,000. In 1911 the company sold the same shares of stock for \$1,010,000, a gain of \$210,000. The

proportionate part of the \$210,000 that is income and subject to an assessment of 1 per cent under the corporation tax act of 1909 must be ascertained, under the Treasury regulations, by that proportion thereof represented by the ratio of 1,019 days that elapsed between January 1, 1909, when the corporation excise tax act became effective, and October 16, 1911, the date of the sale, to the 3,233 days that elapsed between the date of the purchase and the date of the sale. This proportionate part constitutes the income of the corporation for the year 1911 within the meaning of the corporation tax act.

Hays v. Gauley Mountain Coal Co., 38 Supreme Court Rep. 470, p. 471.

CORPORATION EXCISE TAX—SALE OF STOCK—INCOME.

In December, 1902, a coal mining corporation purchased certain shares of stock of another mining corporation for \$800,000. In 1911 the mining corporation sold the same shares of stock for \$1,010,000, being a gain of \$210,000 over the purchase price, omitting the item of interest. The corporation tax act measures the tax by the income received during the year for which the assessment was levied, whether it accrued within that year or some preceding year, but it excludes all income that accrued prior to January 1, 1909, although received after the corporation tax act was in effect. It results that so much of the \$210,000 of profits as may be deemed to have accrued subsequent to December 31, 1908, must be treated as a part of the gross income of the mining company and is subject to the excise tax provided for by the corporation tax act.

Hays v. Gauley Mountain Coal Co., 38 Supreme Court Rep. 470, p. 471.

FORFEITED LANDS—SUIT BY STATE TO SELL—PLEADING.

The commissioner of school lands of a county instituted a suit to sell for the benefit of the school fund certain lands and the undivided interest or estates in oil and gas under various tracts of land alleged to have been forfeited to the State for nonentry on the land books for taxation for five successive years. It is not sufficient to allege in the bill merely that upon the segregation of such undivided estates they were not thereafter entered on the land books. The presumption is that when the whole of such segregated estates have been separately valued and entered for taxation they continued to be entered and valued along with the other estate or estates in the land as an entirety, and the bill must contain allegations sufficient to overcome this presumption. The allegation that the tracts out of which such undivided mineral interests are reserved or granted were entered on the land books as "surface" and that such mineral estates were not subsequently valued or entered or taxed is not sufficient to overcome a pre-

sumption that such mineral estates continued to be entered and taxed as before severance.

State v. Guffey (West Virginia), 95 Southeastern 1048, p. 1049.

TAXATION PREVENTS FORFEITURE.

Taxation of mineral lands in the name of any person claiming the land in whole or in part under any given title prevents forfeiture not only as to him and the portion of land claimed by him but as to all other lands so taxed and all persons claiming the same or any part thereof under the same title.

State v. Guffey (West Virginia), 95 Southeastern 1048, p. 1049.

LIENS.

SALE OR RENTAL OF MINERALS—LIEN FOR ROYALTIES—PLACE OF ENFORCING.

Royalties upon minerals usually, if not always, become due and are a lien on the minerals after separation and consequently as chattels. But if by a conveyance the title to the minerals vests, with a lien reserved for unpaid purchase money payable before separation, then the lien attaches to the minerals as real estate. It follows, therefore, that an action to enforce a lien for the payment of royalties for minerals after separation is transitory, but if the conveyance vests the title to the minerals in the vendee and retains a lien for unpaid purchase money, due and payable before the severance, then the action would be local to the county where the land is located under the Statute of Kentucky.

Roseburg National Bank v. Camp (Oregon), 173 Pacific 313, p. 315.

Kennedy v. Hicks (Kentucky), 203 Southwestern 318, p. 320.

FIXTURES.

PIPES USED IN HYDRAULIC MINING.

Sections of pipe made into a pipe line for carrying water and giants or monitors purchased by the owner of a placer mining plant and placed upon the ground with the intention of using them for the sole purpose of operating the placer mining ground and without any expectation of removing them from the premises, but where it was necessary to make frequent changes in the pipe line, extending the same to keep pace with the progress made in washing the ground, or otherwise changing and separating the joints and removing and reuniting the same as convenience might require, are not fixtures in the sense that they can be sold on execution with the mining claim.

Roseburg National Bank v. Camp (Oregon), 173 Pacific 313, p. 315.

JUDICIAL SALE OF FIXTURES—VALIDITY.

Mining machinery, tools, and implements used in the ordinary process of hydraulic mining on a placer mining claim can not under the statute of Oregon be sold in connection with and as a part of the real estate and mining claim. Neither can a pipe line and the giants or monitors used for applying the water in the operation of placer mining be sold as fixtures where the pipe line was constructed of a series of joints put together in the manner of a stovepipe and constantly removed from place to place, lengthened or shortened as convenience required in the mining operations.

Roseburg National Bank v. Camp (Oregon), 173 Pacific 313, p. 316.

INSURANCE AND LOSS.

LIABILITY AND RECOVERY.

Certain mining property was shipped by boat from Seattle, Wash., to Uyak, Alaska. The property was covered by a policy of marine insurance "in the power schooner Harold Bleakum at and from Seattle, Wash., to Uyak, Alaska." The vessel encountered a storm near the entrance to Uyak Bay which carried away some of her sails, rendered her unmanageable, and after being abandoned by the crew and the master, she was stranded, within the meaning of that term, upon the east shore of the bay. The storm encountered near the entrance to the bay was the proximate cause of the loss of the property insured, as all the subsequent events depended and flowed from the injury to the vessel caused by that storm.

Amok Gold Min. Co. v. Canton Insurance Office (California Appeals), 171 Pacific 1098, p. 1099-1102.

TRUST.

DIVERSION OF TRUST FUND.

The fact that an executrix of a will improperly mingled the royalties received from mining properties with the residuary estate instead of paying the proper proportion to a legatee, gives the legatee an interest in the residue equal to the sum of money that was due her from the funds received as royalties; and a court in a State where ancillary administration proceedings are pending may compel the executrix to pay over to the legatee the amount due without regard to the domiciliary administration proceedings.

Campbell's Estate, In re (Utah), 173 Pacific 688, p. 692.

QUARRY OPERATIONS.

CONTRIBUTORY NEGLIGENCE—CUSTOMARY METHOD OF WORK—OBEYING ORDERS.

An employee injured while working in a quarry is not to be charged with contributory negligence and his action for damages defeated on the ground that he voluntarily chose a hazardous way of doing his work when another and a safer way was open to him, where the evidence shows he was doing his work in the usual and customary way and that he was at the time obeying an order of the superintendent, who was present and saw and knew how the work was being done, made no objections thereto, and gave no warning to appellee of danger because of the way he was doing his work.

Oolitic Stone Mills Co. v. Cain (Indiana Appeals), 119 Northeastern 1005, p. 1007.

NEGLIGENCE—EXCESSIVE BLAST.

In the operations of a quarry an explosion of dynamite threw a rock one and one-half squares distant through a window and injured a woman in a dwelling. Such a violent and unusual result amounts in itself to evidence from which a jury might infer a lack of proper care in the amount of explosive used for the blast.

Rafferty v. Davis (Pennsylvania), 103 Atlantic 951, p. 952.

USE OF EXPLOSIVES—INJURY FROM BLASTING—INFERENCE OF NEGLIGENCE.

In quarry operations where the blasting in which the accident occurred was in the exclusive management of the quarry operator all the elements of the occurrence were within his control. The result was so far out of the usual course that no fair inference that it could have been produced from any other cause than negligence and no other cause is apparent to which the injury may with equal fairness be attributed, an inference of negligence may be drawn. Negligence in such case is not presumed, but the circumstances amount to evidence from which it may be inferred by a jury.

Rafferty v. Davis (Pennsylvania), 103 Atlantic 951, p. 952.

BLASTING—CARE REQUIRED—LIABILITY—PROOF.

Where the work of blasting is done in a thickly settled portion of a city by reason of which a person is injured, damages are recover-

able without proof of negligence and notwithstanding proof that the person firing the blast employed skillful and experienced persons and exercised the highest degree of care. Such work is so inherently dangerous that the doing of it, no matter how careful, is of itself negligence and no amount of care in doing a negligent act will excuse the actor from the responsibility of the consequences.

Rafferty v. Davis (Pennsylvania), 103 Atlantic 591, p. 952.

USE OF DYNAMITE—CARE REQUIRED.

The general rule in cases of the explosion of dynamite where third parties having no relation to the person having it in possession are injured is that the highest degree of care must be exercised.

Rafferty v. Davis (Pennsylvania), 103 Atlantic 591, p. 952.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

DAMAGES FOR FUTURE PAIN AND SUFFERING.

In an action by a miner for damages for injuries caused by the alleged negligence of the mine operator, the court may properly instruct the jury that they have the right and should take into consideration among other things "the physical pain and mental anguish suffered and endured, and that he will probably hereafter endure by reason and on account of said injury."

Picino v. Utah-Apex Min. Co. (Utah), 173 Pacific 900.

DAMAGES NOT EXCESSIVE.

INSTANCES.

A judgment for \$15,000 in favor of an oil-well driller, a healthy man 29 years of age, earning \$90 a month, is not excessive where his right hand and arm below the elbow were crushed and rendered worthless and after the accident he was confined to a hospital for four months undergoing three operations at a total expense of \$1,000.

Farmers' Petroleum Co. v. Shelton (Texas), 202 Southwestern 194, p. 198.

DAMAGES EXCESSIVE.

INSTANCES.

A miner caught between a coal car and a prop suffered a fracture of the pelvic bone and other injuries. The pelvic bone healed and he was able to work after about one month. There was some ossification of the muscle that prevented as free use of his legs as formerly and some pain and inconvenience suffered in that respect, but there was no prospect of any future loss of earnings and he was entitled to no damages except the one month's wages and compensation for pain suffered and the inconvenience. A verdict of \$3,750 was regarded as excessive and a remitter of \$1,250 was ordered and if refused a new trial to be granted.

Whittaker v. Valley Camp Coal Co. (Pennsylvania), 103 Atlantic 594, p. 595.

INTERSTATE COMMERCE.

TAXATION OF PRODUCT OF MINE.

A license tax imposed upon that part of the product of a sulphur mine that is sold in interstate and foreign commerce is invalid.

Union Sulphur Co. v. Reed, 249 Federal 172, p. 174.

ADDITIONAL COPIES

OF THIS PUBLICATION MAY BE PROCURED FROM
THE SUPERINTENDENT OF DOCUMENTS
GOVERNMENT PRINTING OFFICE
WASHINGTON, D. C.

AT
20 CENTS PER COPY







